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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LOCAL NO. 82, FURNITURE AND PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN, AND PACKERS; BART GRIFFITHS, SECRETARY-TREASURER, LOCAL NO. 82; GEORGE HARRIS, PRESIDENT, LOCAL NO. 82; PHILLIP PIEMONTESE, CHAIRMAN OF THE ELECTION COMMITTEE OF LOCAL NO. 82; and JOHN DOE, JAMES DOE and JEROME DOE, MEMBERS OF THE ELECTION COMMITTEE OF LOCAL NO. 82,

Petitioners,

v.

JEROME CROWLEY, ANTHONY COYNE, JOSEPH FAHEY, ROBERT LUNNIN, JAMES HAYES, GERALD OWENS, JOHN LYNCH, JOSEPH TRASK, JOSEPH MONTAGNA, and DENNIS BATES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does § 102 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 412, authorize a district court, on the basis of a suit by individual union members, to order a union to conduct an election of officers under the supervision of third parties not associated with the union, who have been appointed by the court and utilizing election rules and procedures prescribed by the court?

2. Do the remedies prescribed by § 402 of the Act, 29 U.S.C. § 482, for resolving disputes concerning the election of union officers proscribe the jurisdiction of the district court to enjoin the tabulation of ballots cast after the balloting process has been virtually completed?

LIST OF PARTIES

In addition to the parties listed in the caption, the Secretary of Labor intervened as an appellant in the court of appeals in opposition to the lower court's holding on jurisdiction.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners, Local No. 82, Furniture and Piano Moving, Furniture Store Drivers, Helpers, Warehousemen, and Packers; Bart Griffiths, Secretary-Treasurer, Local No. 82; George Harris, President, Local No. 82;[1] Phillip Piemontese, Chairman of the Election Committee of Local 82; and John Doe, James Doe and Jerome Doe, Members

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[1] George Harris is no longer the President of Local 82, having been defeated for re-election in the election conducted by order of the district court.

of the Election Committee of Local 82, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the District Court for the District of Massachusetts is officially reported at 521 F. Supp. 614, and is reprinted in App. A, pp. 1a-40a. The opinion of the United States Court of Appeals for the First Circuit has been reported at 679 F.2d 978 and is reprinted in App. B, pp. 41a-93a.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on May 21, 1982, and is reprinted in App. C, p. 94a. On June 15, 1982, the Court of Appeals entered an order denying Defendants-Appellants' petition for rehearing and suggestion for rehearing en banc. It is reprinted in App. D, p. 95a. This Court has jurisdiction to review the judgment of the court below pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Sections 102, 402 and 403 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 412, 482, and 483. These, and other relevant statutory provisions, are reprinted in App. E, pp. 96a-103a.

STATEMENT OF THE CASE

1. Statement of Facts

Local Union 82 is a labor organization required to conduct its election of officers no less than once every three years. 29 U.S.C. § 481(b).[3] Respondents are members of that union, which consists of approximately seven hundred

[3] App. E, p. 98a.

employees of companies engaged in the furniture moving business in the Boston area. The union is governed by a seven-member elected executive board. At the time suit was brought, Bart Griffiths was the elected secretary-treasurer and principal executive officer, and George Harris was the elected president.

On November 9, 1980, Local 82 conducted a meeting at which members in good standing were afforded the right to nominate candidates to run for all seven elective offices. The local union executive board had previously exercised its authority under the union's bylaws and decided to conduct the election by mail referendum balloting, the balloting procedure utilized in prior elections. The ballots were scheduled to be tabulated on December 13, 1980, and had to have been returned to a designated post office box by 9:00 a.m. on that date in order to be counted. (Def. Trial Exh. 12, App. H, p. 113a)

At the November 9, 1980 nomination meeting, a dispute arose over the requirement that members verify their good standing status within the union, a requisite for attending and participating in the meeting. The local required members to produce a receipt showing that their dues had been paid through the month prior to the nomination meeting (October, 1980), as required by the union's bylaws. One plaintiff, Jerome Crowley, was denied entry to the meeting when he failed to proffer the receipt and refused the union's offer to delay the meeting so that he could return home to obtain the necessary document. Several other members were also denied entry because of their failure to produce the required receipt. However, the meeting was attended by more members than any other meeting conducted by the local union during the prior two years.

After questions regarding entry to the hall were resolved, Griffiths opened the meeting and announced that the local union's meeting attendance requirement for eligi-

bility to run for office would not be enforced. As a result, the only requirement to become a candidate for office was that a member's dues had to have been paid in a timely manner during each of the twenty-four consecutive months prior to nomination. Griffiths then read a list containing the names of sixteen members who were "eligible" to run for office and another list with the names of eleven "ineligible" members, the latter of which included an incumbent officer.[3] The remainder of the 700 members was not on either list. At this point the meeting became disorderly but the nomination process was, nonetheless, begun. Griffiths was nominated for the office of secretary-treasurer and, according to plaintiffs, Lynch was as well. Defendants assert that Griffiths was the only candidate nominated for secretary-treasurer while Lynch was nominated for the office of president, along with the incumbent Harris and John Perry.[4] Nominations for the remaining five offices were less controversial. The most important event during the nomination meeting for purposes of this litigation was the recording of Lynch's nomination.

Balloting packets were subsequently distributed to the local union's membership during November, 1980, and included instructions that ballots be deposited in the mail by December 12, 1980, in time to be recovered from the designated post office on the morning of December 13, 1980. (Def. Trial Exh. 42, App. H, p. 115a) The ballots were to be tabulated immediately thereafter.

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[3] Plaintiffs Crowley, Coyne, Lunnin and Hayes were listed as "ineligible"; Lynch was on the "eligible" list. None of the other plaintiffs was on either list.

[4] Lynch testified that he was nominated for the office of president (App. B, p. 69a) but the district court concluded that he was nominated for the office of secretary-treasurer (App. A, p. 20a-21a), presumably based upon testimony of other plaintiffs. The court of appeals noted Lynch's own testimony, but refused to set aside the district court's finding as being clearly erroneous. (App. B, p. 70a)

2. Proceedings Below

A. The District Court

Plaintiffs filed suit on December 1, 1980, after the balloting packets had been mailed to Local 82's members, invoking the district court's jurisdiction under Section 102 of the LMRDA, 29 U.S.C. § 412. A total of ten "claims" were made, all concerning events which occurred prior to or during the nomination meeting. Five "claims" charged denial of equal rights in violation of 29 U.S.C. § 411(a)(1),[5] three alleged denial of the right to free speech in violation of 29 U.S.C. § 411(a)(2),[6] one asserted unlawful discipline in violation of 29 U.S.C. § 411(a)(5),[7] and one charged a violation of the right to nominate candidates protected under 29 U.S.C. § 481(e).[8] The complaint sought preliminary relief in the form of an order nullifying the November 9, 1980 nomination meeting and directing the local union to conduct a new nomination meeting with safeguards to ensure that each member could exercise his or her statutory rights. The district court issued a temporary restraining order on the afternoon of December 12, 1980, the day before the ballots were to be tabulated and the last day on which they could be marked and mailed, for the stated purpose of preserving its jurisdiction.[9] The defendants were enjoined from tabulating the ballots and were directed to deliver all ballots retrieved from the post office box on December 13, 1980 into the court's possession.

A five day evidentiary hearing was conducted during December, 1980 on the motion for preliminary relief. Plaintiffs moved to amend the complaint on January 30,

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[5] App. E, p. 96a.

[6] App. E, p. 96a.

[7] App. E, pp. 97a-98a.

[8] App. E, pp. 99a-100a.

[9] The temporary restraining order is reprinted at App. F, p. 104a.

1981, pursuant to Rule 15(b), F.R.C.P., adding an allegation that the local union had violated 29 U.S.C. § 411(a)(3)[10] by improperly establishing dues rates during the period since 1976.

After numerous other hearings regarding the terms of an order and an evidentiary hearing limited to the dues issue raised in the amended complaint, the district court issued a preliminary injunction and memorandum opinion on July 13, 1981. The court found that it had Title I jurisdiction on the basis of the allegations that the defendants had violated §§ 101(a)(1) and (2) by imposing the dues receipt requirement as a condition of admission to the nomination meeting and by refusing to allow Lynch to run for the office of secretary-treasurer.[11] The district court concluded that it lacked Title I jurisdiction to review the union's candidate-eligibility requirements and also found that plaintiffs had not established a reasonable likelihood of success on their claim that those rules had been imposed in retaliation for their exercise of § 101(a)(2) free speech rights or were discriminatorily applied.[12]

To remedy the two nomination meeting related violations over which it concluded it had jurisdiction, the district court entered an injunction nullifying the November 9, 1980 nomination meeting, restraining the union from counting the ballots cast in the December 13, 1980 election, and ordering a new nomination meeting and election under terms and conditions established by the court.[13] The court appointed third parties who were

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[10] App. E, pp. 96a-97a. Plaintiffs' motion was granted on February 27, 1981, and the district court conducted an additional evidentiary hearing on March 6, 1981, which was limited to the new issues in the amended complaint.

[11] App. A, p. 13a.

[12] App. A, pp. 12a, 22a-23a.

[13] The full injunction is reprinted in App. B, pp. 86a-93a.

neither officers nor members of the union to supervise the new nomination and election and authorized them to render decisions concerning candidate and voter-eligibility, bypassing the union's constitutional procedures. The third parties were also vested with responsibility for arranging for the distribution of campaign literature for all candidates, although no issue had been raised as to the propriety of the union's actions in that regard in the first election. Defendants' request for a stay of those aspects of the injunctive order directing that a new election be held immediately was denied by the district court, as was defendants' request that plaintiffs be required to post a bond to secure the costs of the new election.

B. The Court of Appeals

An appeal was taken from the district court's decision, pursuant to 28 U.S.C. § 1292. Defendants' motion for a stay of the order to conduct an election pending appeal was denied by the court of appeals. On December 28, 1981, the Secretary of Labor's motion for leave to intervene as an appellant was granted. The First Circuit panel which heard the appeal issued a majority opinion and judgment affirming the district court's decision on May 21, 1982.

Addressing the jurisdictional question, the majority of the panel held that the district court properly exercised its authority under Title I to remedy the two statutory violations which occurred at the nomination meeting. The court focused on the word "conducted" in § 403, 29 U.S.C. § 483, and concluded that a suit involving election-related issues was not subject to the exclusive jurisdiction of the Secretary of Labor "until all the ballots are counted." App. B, p. 67a.[14] While the court of appeals acknowl-

[14] In focusing on this issue, which was raised primarily by the Secretary of Labor, the majority of the Circuit Court panel ignored the union's basic argument that the district court, regardless of whether it had Title I jurisdiction to remedy nomination

edged that the legislative history was silent as to the precise point at which an election has been "conducted" and noted that this Court has consistently recognized the role of the Secretary of Labor in resolving election-related disputes, it read this Court's decisions in *Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972) and *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), as undercutting the policy of judicial non-interference in union elections articulated in *Calhoon* v. *Harvey*, 379 U.S. 134 (1964). App. B, p. 52a. The lower court proceeded to review the legislative history of the LMRDA and concluded that Congress did not intend Title I rights to be subordinated by Title IV, a result which, in its view, would occur were union members required to process election disputes through the Secretary of Labor under § 402, 29 U.S.C. § 482, rather than having direct access to the federal courts. App. B, pp. 63a, 65a-66a. The majority interpreted the legislative history providing a private right of enforcement of Title I as evidencing Congress' lack of faith in the ability of the Secretary to enforce Title I rights. The panel adopted the views of commentators who have criticized this Court's *Calhoon* decision on the basis that requiring members to rely on the Secretary of Labor for resolution of election problems allegedly will result in the non-enforcement of important statutory guarantees.[15]

With respect to other issues presented in the appeal, the Circuit Court concluded that the issuance of an injunction directing that a new election be conducted was not an abuse of the district court's discretion, even though it had

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meeting misconduct, lacked authority to supervise a new election of officers since Congress specifically vested that remedy in the Secretary of Labor. The union's argument was adopted by Circuit Judge Campbell in dissent. App. B, pp. 82a-85a.

[15] "[F]oreclosure of Title I claims once balloting begins would prevent effective relief for violations that occur during the election, such as denial of access to the polling place or failure to provide a minority with ballots." (Citation omitted) App. B, p. 66a.

the effect of awarding ultimate relief on the merits.[16] Finally, the court of appeals affirmed the district court's finding that plaintiffs need not post a bond to secure the injunction, pursuant to Rule 65(c), Federal Rules of Civil Procedure.

Writing in dissent, Circuit Judge Campbell was "unable to read Title I as extending so far as to allow a district court, once balloting has commenced, to invalidate an election and order a new one under its supervision and under terms and conditions extemporized by the courts and parties." App. B, p. 82a. He recognized that the majority's decision "would allow relief under Title I (ordering and supervising a new election) which heretofore has existed only under Title IV." *Id.* at 83a. Rejecting the majority's finding that Titles I and IV could be accommodated merely by determining the point in the election process at which a complaint had been filed, Circuit Judge Campbell would have made that determination turn on the nature of the relief requested as well as the stage which the election process has reached. *Id.* at 83a-85a. If the requested relief required the conduct of a new election, a remedy specifically provided by Title IV, many concerns would argue against finding Title I jurisdiction. However, if relief could be granted which did not require a new election to be conducted, Title I jurisdiction might be invoked.

REASONS FOR GRANTING THE WRIT

At issue in this case is the authority of a district court to require a union to nullify an ongoing election of officers and to conduct a new election in a different form or manner than is required by its own constitution or bylaws in response to a suit brought by an individual mem-

[16] Indeed, the relief requested by plaintiffs was only that Local 82 be ordered to conduct a new nomination meeting, not that a new election be held under the supervision of third parties not associated with the union who were appointed by the district court.

ber of the union under Title I. Previously, courts have held that only the Secretary of Labor may bring suit to nullify the results of an election of officers and only on the basis of a complaint processed in accordance with § 402, 29 U.S.C. § 482.

The threshhold question is one of statutory construction: did Congress, in enacting § 102 of the LMRDA, intend to divest the Secretary of Labor of the authority conferred on that office by §§ 402 and 403 to review union elections of officers, to determine whether statutory violations occurred which warranted setting aside the elections, and to supervise any subsequent election utilizing rules and regulations determined to be consistent with the Act.

If it is determined that Congress intended § 102 to authorize the district courts, in response to a suit brought by an individual union member, to grant relief requiring the union to conduct a rerun election of officers in a manner different than is required by its own constitution and under the direct supervision and control of the court, then the case poses a second question: at what point is an election considered to be "already conducted" for purposes of § 403.

The United States Department of Labor has reported the existence of some 53,489 labor organizations subject to the requirements of the LMRDA.[17] The vast majority are local unions required to conduct elections of officers no less frequently than once every three years.[18] While Congress, in enacting the LMRDA, recognized the "desirability of minimum interference by Government in the internal affairs of any private organization," [19] the effect

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[17] *Compliance, Enforcement and Reporting in 1978*, U.S. Department of Labor, G.P.O. at 29 (1981).

[18] Section 401(b), 29 U.S.C. § 481(b); App. E, p. 98a.

[19] S. Rep. No. 187, 86th Cong., 1st Sess. at 7 (1959).

of the decisions of the lower courts in this case will be, and already has been,[20] to create a private cause of action which will involve the courts in the routine procedures of conducting union elections of officers. Such development will permit individual union members to circumvent the statutory enforcement mechanism which was specifically adopted to minimize the disruptive effects of election-related litigation on the administration of labor unions. *Trbovich* v. *United Mine Workers*, *supra*, 404 U.S. at 532.

In expanding the coverage of Title I in the area of elections of union officers, the First Circuit's holding is at odds with the recent decisions of this Court regarding the scope of that provision of the statute.[21] In determining that an election has not been "already conducted" until the ballot tabulation process has been completed, the majority's ruling conflicts with decisions in the Second and Third Circuits. Thus, the questions raised by this case are significant and will be recurring.

I. CONGRESS DESIGNATED THE SECRETARY OF LABOR AS THE SOLE AGENT TO SUPERVISE ELECTIONS OF UNION OFFICERS

A. Legislative History

The LMRDA is the "first comprehensive regulation by Congress of internal union affairs." *NLRB* v. *Allis Chalmers Manufacturing Co.*, 388 U.S. 175, 193 (1967). Title IV was adopted after an "extensive and vigorous debate" over the methods for ensuring that union members could select their leaders through "free and democratic elections." *Wirtz* v. *Glass Bottle Blowers*, 389 U.S. 463, 470-71 (1968). It was the product of the legislative process, with those committed to establishing minimal

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[20] *See, Canez* v. *Guerrero*, —— F. Supp. ——, Civ. No. 82-811 (D. Ariz. filed June 5, 1982); reprinted in App. G. pp. 106a-111a.

[21] *See, Finnegan* v. *Leu*, —— U.S. ——, 50 U.S.L.W. 4480 (U.S. May 17, 1982), and *Steelworkers* v. *Sadlowski*, —— U.S. ——, 50 U.S.L.W. 4626 (June 14, 1982).

standards for union elections prevailing over those who would have legislated detailed procedures for unions to follow.[22] All of the major bills considered by the Congress vested the Secretary of Labor, the agent of government "most familiar with union problems," [23] with authority to supervise any rerun election.[24]

The legislative history of Title I provides no evidence to support the First Circuit's conclusion that district courts may exercise Title I jurisdiction to supervise elections of union officers and, in so doing, are free to supplement the procedures specified in Title IV. This Court has recognized that Title IV, not Title I, is the special "vehicle" through which Congress sought to assure democracy in elections of union officers. *Wirtz* v. *Hotel Employees Union*, 391 U.S. 492, 498 (1968). Congress believed that only essential standards should be imposed by legislation and, in Title IV, set forth certain minimum electoral standards. S. Rept. No. 1684, 85th Cong., 2d Sess., at 4-5 (1958). So long as unions conform with these standards, they are free to run their own elections. *Wirtz* v. *Glass Bottle Blowers*, *supra*, 389 U.S. at 471; *Steelworkers* v. *Sadlowski*, *supra*, 50 U.S.L.W. at 4630.

The First Circuit's conclusion that Congress added Title I to supplement the electoral procedures of Title IV because of a lack of faith in the Secretary's enforcement abilities or to authorize judicial activism in the area of union elections [25] is unsupported by the legislative history. In considering Title I, Congress was motivated by the same principles that formed Title IV and the remaining provisions of the Act; namely, a desire to correct specific abuses while minimizing the extent of federal intrusion

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[22] S. Rept. No. 187, *supra*, at 7.

[23] *Calhoon* v. *Harvey*, *supra*, 371 U.S. at 139-40.

[24] *See*, National Labor Relations Board, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 [hereinafter, "Leg. Hist. at ——"], at 727-29 (Elliot bill); 657-59 (Landrum-Griffin bills); 907-09 (Shelley bill).

[25] App. B, pp. 59a, 67a.

into internal union affairs. Senator McClellan described his proposed amendment as "minimum standards of democratic processes," "the very minimum," "the basic things" required to address specific abuses.[26] A substitute was offered by senators who explained that their intent was to "remove the extremes raised by the [McClellan] amendment."[27] This amendment was approved by an overwhelming majority in the Senate, including Senator McClellan.[28] The House subsequently approved this compromise "bill of rights" without even considering it in committee.[29]

Thus, the legislative history does not support the First Circuit's conclusion that Congress intended Title I to supplement and expand the provisions of Title IV.[30] In fact, the legislative history demonstrates that in the area of union elections of officers, specific proposals to limit the Secretary's exclusive authority to bring suit under § 403 were repeatedly defeated.[31] Moreover, all of the major bills considered during the lengthy legislative process relied upon the Secretary of Labor to conduct rerun elections of officers and to establish the terms of such elec-

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[26] II Leg. Hist. at 1098, 1100, 1103.

[27] II Leg. Hist. at 1234 (Sen. Cooper). *See also*, Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 851, 855-60 (1960). [hereinafter, "Aaron, at ——"].

[28] II Leg. Hist. at 1239.

[29] Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 833 (1960) [hereinafter, "Cox, at ——."].

[30] Nor does the legislative history suggest that Congress lacked faith in the Secretary of Labor's ability to ensure democratic procedures. App. B, p. 59a. The lower court overlooked the fact that private enforcement of Title I was substituted in the Kuchel amendment for the governmental enforcement provided by the McClellan proposal primarily to placate Southern legislators concerned with creating a precedent for civil rights legislation. Cox, *supra*, at 832-33; Aaron, *supra*, at 859; II Leg. Hist. at 1223-24 (Sen. Johnston).

[31] 104 Cong. Rec. 1105 (1958); II Leg. Hist. at 984.

tions. Not one word of the legislative history supports the theory that those functions were to be performed by a district court.

B. The Decisions of The Lower Courts In This Case Are In Direct Conflict With The Decisions of This Court on This Issue

The First Circuit's erroneous conclusion that Title 1 authorizes district courts to consider private suits to set aside union elections and to prescribe procedures inconsistent with the union's rules for conducting a new election evidences a misreading of the decisions of this Court, as well as of the legislative history. The remedy adopted by Congress to resolve disputes concerning elections of officers was for the union to conduct a supervised election. *Wirtz* v. *Glass Bottle Blowers, supra*, 389 U.S. at 475. And the sole agent selected by Congress to supervise that election was the Secretary of Labor, not the district court or its designee. *Calhoon* v. *Harvey, supra*, 379 U.S. at 140.

This Court has repeatedly reaffirmed the Secretary's exclusive Title IV authority by requiring that complaints "concerning the conduct of the election itself" be processed "only according to the post-election procedures specified in 29 USC § 482." *Dunlop* v. *Bachowski*, 421 U.S. 560, 566 (1975). In adopting Title IV, Congress harmonized the need to eliminate election abuses with a desire to avoid unnecessary governmental intervention. *Hodgson* v. *Local Union 6799, USWA*, 403 U.S. 333, 339 (1971). Even when an election violates the standards established in § 401, the Act's "stated commitment is to postpone governmental intervention until the union is afforded the opportunity to redress the violation." *Wirtz* v. *Glass Bottle Blowers, supra*, 389 U.S. at 472. The remedial processes adopted serve the public interest by preventing individuals from blocking or delaying union elections by filing federal court suits,[22] as well as protecting unions from frivolous

[22] *Calhoon* v. *Harvey, supra*, 379 U.S. at 140.

litigation and centralizing in a single proceeding such litigation as might be warranted.[33] In short, this Court has repeatedly affirmed the Congressional enforcement scheme in the face of suits by individuals seeking to avoid the jurisdiction of the Secretary of Labor and gain direct access to the courts.

Nonetheless, some lower courts have adopted the views of commentators who have criticized the statutory scheme and the decisions of this Court which require election complaints to be processed in compliance with § 402. The First Circuit has joined those lower courts which have read *Trbovich* and *Bachowski* as undercutting *Calhoon's* policy of non-intervention in the internal affairs of unions and which view those decisions as inviting "greater harassment of offending unions" by authorizing private enforcement suits. App. B, p. 52a; *Bunz* v. *Moving Picture Mach. Operators' U.*, 567 F.2d 1117, 1124 (D.C. Cir. 1977); *Kupau* v. *Yamamoto*, 622 F.2d 449, 456 (9th Cir. 1980). And in *Kupau*, the Ninth Circuit dismissed as "difficult to take . . . literally"[34] the admonition in *Bachowski* that "provisions concerning the conduct of the election itself . . . may be enforced only according to post-election procedures." 421 U.S. at 566.

Yet none of these earlier decisions has as great a potential for disrupting the statutory scheme for resolving election problems as does the instant case. As Circuit Judge Campbell noted, the majority's decision authorizes "sweeping judicial relief" under Title I which is "both unprecedented and beyond the contemplation of the statute."[35] While the *Kupau* court extended Title I jurisdiction to cover events arising after an election but growing out of the election, even that case did not involve a request by a private individual for the district court to grant the Title IV remedy of nullification of the election results and supervision of the conduct of a new election. Indeed,

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[33] *Trbovich* v. *United Mine Workers*, *supra*, 404 U.S. at 532.

[34] 622 F.2d at 456.

[35] App. B, pp. 82a-83a.

the court there intervened to protect the winning candidate's right to assume office. 622 F.2d at 452-3. The factual circumstances of the *Kupau* case were relatively unique and did not involve delaying the union's election or changing the union's procedures.

In contrast, numerous suits seeking pre-election Title IV relief similar to that in the instant case are filed annually. Yet none of the decisions reported prior to the instant case have resulted in a federal court assuming the responsibility to conduct an election, even though the court had found an actual pre-election Title I violation. The courts have consistently respected the Secretary of Labor's authority where the remedy requested would have required the district court to supervise the details of the union election. *Robins* v. *Rarback*, 325 F.2d 929, 930-1 (2d Cir. 1963), *cert. denied*, 379 U.S. 974 (1965); *Driscoll* v. *Operating Engineers, Local 139*, 484 F.2d 682, 688 (7th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974). In contrast, the district court in this case assumed control of the union's election processes. In the brief time since the decisions in this case have issued, a district court in Arizona has cited those decisions in granting a § 102 injunction altering a union's election procedures on the eve of its scheduled election. *Canez* v. *Guerrero, supra.* App. G, pp. 106a-111a.

The decisions in this case and in *Canez* are the forefront of what appears to be a trend to avoid the carefully constructed Title IV statutory enforcement procedure and to grant Title IV relief in response to Title I suits. This direct judicial intervention in internal union elections is contrary to the legislative mandate that "unions should be left free to 'operate their own affairs, as far as possible,' S. Rept. No. 1684, 85th Cong., 2d Sess., at 4-5 (1958)," a principle recently reaffirmed by this Court. *Steelworkers* v. *Sadlowski, supra*, 50 U.S.L.W. at 4630. These decisions subject unions to a multiplicity of litigation involving a single election,[26] circumvent the statutory

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[26] *E.g.*, *Kupau* v. *Yamamoto, supra*, 622 F.2d at 452-3; *Colpo* v. *Teamsters, Local 326*, 504 F. Supp. 573, 574 (D. Del. 1980), *aff'd*,

screening procedure which the Secretary of Labor was to undertake,[37] and substitute the court's judgment for "the special knowledge and discretion of the Secretary of Labor . . . the agen[t] of Government most familiar with union problems."[38] Moreover, they are the unwarranted extension of faulted decisions of other circuit courts suggesting that this Court's adherence to the statutory scheme has been eroded since *Calhoon*.

This petition should be granted to re-emphasize that a Congress "committed to minimal intervention" vested the Secretary of Labor with the broad and exclusive authority to ensure "that intervention, once warranted, [was] effective in carrying out the basic aim of Title IV." *Wirtz* v. *Glass Bottle Blowers, supra*, 389 U.S. at 473 and n.11.

II. THE LOWER COURTS' DECISIONS THWART THE STATUTORY PURPOSES BY THEIR INTERPRETATION OF WHEN AN ELECTION IS "CONDUCTED" AND ARE IN CONFLICT WITH THE DECISIONS OF COURTS OF APPEALS FOR OTHER CIRCUITS

This Court has noted that in interpreting the LMRDA, courts "must look to the objectives Congress sought to achieve, and avoid placing great emphasis upon close construction of the words." *Steelworkers* v. *Sadlowski*, *supra*, 50 U.S.L.W. at 4629; *Wirtz* v. *Glass Bottle Blowers*, *supra*, 389 U.S. at 468 and n.6; *Hall* v. *Cole*, 412 U.S. 1, 11 and n.17 (1973). Disregarding this guidance, when the First Circuit panel focused on the phrase "already conducted" in § 403 in order to determine whether the Secretary of Labor had exclusive authority to review Local 82's election, the majority settled on a mechanistic interpretation; specifically, that an election has not been "already conducted" until the ballot tabulation process has been "completed." App. B, pp. 65a, 67a. Such an

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659 F.2d 399 (3d Cir. 1981); *Rollison* v. *Hotel Employees, Local 879*, 677 F.2d 741, 743 (9th Cir. 1982).

[37] *Trbovich* v. *United Mine Workers*, *supra*, 404 U.S. at 532.

[38] *Calhoon* v. *Harvey*, *supra*, 379 U.S. at 140.

inflexible policy fosters a "race to the courthouse" and encourages pre-election suits concerning "the conduct of the election itself." *Dunlop* v. *Bachowski*, *supra*, 421 U.S. at 566.

The First Circuit's decision directly conflicts with those in other circuits. The Third Circuit has held an election to have been "already conducted" once balloting has occurred, even where there has not been a final tabulation of the results. *McDonough* v. *Local 825, Operating Engineers*, 470 F.2d 261, 264 (3d Cir. 1972). The Second Circuit has found Title IV jurisdiction to extend over practices occurring "subsequent to the nomination and voting." *Libutti* v. *DiBrizzi*, 337 F.2d 216, 218 (2d Cir. 1964). District courts in that circuit have followed *McDonough*, concluding that to issue an injunction "after the actual voting process is under way would seriously undermine the goals of Title IV" by allowing the federal courts to be used to disrupt union elections."[39] *Laski* v. *Intern. Org. of Masters, Mates & Pilots*, 502 F. Supp. 134, 136 (S.D.N.Y. 1980); *New Action Coalition* v. *Local 2, United Fed. of Teachers*, 510 F. Supp. 1208, 1211 (S.D.N.Y. 1981). In each of those cases, injunctions, sought after mail balloting packets had been distributed to the members but before the ballots were returned to be tabulated, were denied, the courts finding § 402 to provide the exclusive remedy at that point.

Adoption of the test articulated by the First Circuit will result in the circumvention of the Title IV enforcement procedure whenever an offense actionable under that Title also could be characterized as invoking Title I.[40]

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[39] The disruption such a policy would permit has been amply demonstrated in this case. The election originally scheduled for December 13, 1980 was enjoined on December 12, after the vast majority of the votes had been cast and returned via the mail. The election ordered by the district court was not completed until December 12, 1981, a year later to the day.

[40] The allegations here, for example, are routinely dealt with by the Secretary of Labor as violations of § 401. E.g., *Hodgson* v.

Lawrence v. *Utility Wkrs. U. of America*, 509 F. Supp. 1151, 1156-7 (N.D. Ohio 1981). As the lower courts here have noted, there exists a great desire on the part of individual members to pursue election complaints directly in the courts. App. A, pp. 11a-12a, App. B, p. 60a. Yet the administrative procedures of Title IV were intentionally adopted to accomplish specific goals[41] and evidence the Congressional intent to treat elections of officers differently than Title I complaints, entrusting to the Secretary of Labor the vindication of protected rights. *McGuire* v. *Grand Int'l Div. of Bro. of Loc. Eng.*, 426 F.2d 504, 508 (6th Cir. 1970).

The rule adopted by the First Circuit is inflexible, substitutes that court's view of how the Act should be enforced for that of the Congress, and, most importantly from the point of view of the exercise of this Court's jurisdiction herein, conflicts with decisions of other circuit courts of appeals.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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District 6, Mine Workers, 474 F.2d 940, 942-43 (6th Cir. 1973); *Wirtz* v. *Nat'l Maritime U.*, 399 F.2d 544 (2d Cir. 1968).

[41] *Trbovich* v. *United Mine Workers*, *supra*, 404 U.S. at 532.

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No. 82-432

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

LOCAL NO. 82, FURNITURE and PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN, and PACKERS; BART GRIFFITHS, SECRETARY-TREASURER, LOCAL NO. 82; GEORGE HARRIS, PRESIDENT, LOCAL NO. 82; PHILLIP PIEMONTESE, CHAIRMAN of the ELECTION COMMITTEE of LOCAL NO. 82; and JOHN DOE, JAMES DOE and JEROME DOE, MEMBERS of the ELECTION COMMITTEE of LOCAL NO. 82.

Petitioners,

v.

JEROME CROWLEY, ANTHONY COYNE, JOSEPH FAHEY, ROBERT LUNNIN, JAMES HAYES, GERALD OWENS, JOHN LYNCH, JOSEPH TRASK, JOSEPH MONTAGNA, and DENNIS BATES,

Respondents.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 80-2680-K

JEROME [redacted]OWLEY, ANTHONY COYNE, JOSEPH FAHEY, ROBERT LUNNIN, JAMES HAYES, GERALD OWENS, JOHN LYNCH, JOSEPH TRASK, and JOSEPH MONTAGNA,
Plaintiffs

v.

LOCAL NO. 82, FURNITURE and PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN, and PACKERS; BART GRIFFITHS, SECRETARY-TREASURER, LOCAL NO. 82; GEORGE HARRIS, PRESIDENT, LOCAL NO. 82; PHILLIP PIEMONTESE, CHAIRMAN of the ELECTION COMMITTEE OF LOCAL NO. 82; and JOHN DOE, JAMES DOE and JEROME DOE, MEMBERS of the ELECTION COMMITTEE of LOCAL NO. 82,
Defendants

July 13, 1981

MEMORANDUM

I. Introduction and Procedural History of the Litigation

This case arises out of a dispute concerning a meeting of the membership of the Furniture and Piano Moving, Furniture Store Drivers, Helpers, Warehousemen and Packers, Local No. 82 ("Local 82"), which is affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("the International"), on November 9, 1980, at which the nomination of candidates for the Local's Executive Board was

conducted. Plaintiffs, nine members of Local 82, brought this action on behalf of themselves and two classes [1] of Local members against the Local, Bart Griffiths, its secretary-treasurer, George Harris, its president, and Phillip Piemontese, the chairman of its election committee.[2] Plaintiffs allege that defendants violated Title I of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 411-415 ("LMRDA" or "the Act") by denying plaintiffs their rights to attend union meetings and nominate candidates on an equal basis with other Local members, and to speak freely on matters relating to union business without reprisal. In addition, plaintiffs claim that the union rule that only members who have paid their dues on time for the twenty-four consecutive months before the nominations meeting may be candidates for Local office ("the 24 month rule")[3] constitutes an un-

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[1] This court has not been requested to certify either of the proposed classes.

[2] Unidentified members of Local 82's election committee were also named as defendants.

[3] Article II, section 4(a)(1) of the 1976 Constitution of the International Union ("International Constitution") provides that:

> To be eligible for election to any office in a Local Union, a member must be in continuous good standing in the Local Union in which he is a member and in which he is seeking office, and actively employed at the craft within the jurisdiction of such Local Union, for a period of twenty-four (24) consecutive months prior to nomination for said office and must be eligible to hold the office if elected. "Continuous good standing" means compliance with the provisions of Article X, Section 5 concerning the payment of dues for a period of twenty-four (24) consecutive months, together with no interruptions in active membership in the Local Union for which office is sought because of suspensions, expulsions, withdrawals, transfers or failure to pay fines or assessments. . . .

See also Article VI, section 3(b) of the "Constitution and By-Laws of Local 82" ("Local By-laws"):

> (b) Every member in good standing, by the payment of his dues on or before the last business day of the current month,

reasonable restriction on plaintiffs' right to seek union office in violation of Title IV of the Act, 29 U.S.C. § 481 (e). Defendants argue that because the conduct at issue bears upon the procedures for conducting union elections, plaintiffs' exclusive remedy is to file a complaint with the Secretary of Labor under Title IV of the LMRDA, and that 29 U.S.C. § 483 and the Supreme Court's decision in *Calhoon* v. *Harvey*, 379 U.S. 134 (1964), deny this court jurisdiction over this action.

The Local's election was to be completed December 13, 1980. On December 12, 1980, after hearing, the court entered a temporary restraining order to avoid irreparable harm to the plaintiffs and to preserve both the status quo and the court's jurisdiction. *See* note 12, *infra*. The restraining order provided that pending further order of the court:

> The ballots to be received by Local 82 from P.O. Box 530, East Milton, Massachusetts, on December 13, 1980 at 9:00 a.m. and any other ballots received by Local 82 in any other way shall not be counted but shall be collected, sealed, and delivered immediately thereafter to an officer of this court in whose custody they shall remain until further order of the court. If the court determines, after hearing, that

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in accordance with the International Constitution, and who has been in such continuous good standing for each consecutive month in the twenty-four (24) month period immediately prior to nominations and who has attended at least fifty percent (50%) of the regular or divisional meeting of the Local Union during the twenty-four (24) consecutive months prior to nomination, shall be eligible to hold office, if he is otherwise qualified under the International Constitution and these By-Laws. . . . No member shall lose his good standing status for any month in which his dues have been withheld by his employer for payment to the Local Union pursuant to his voluntary authorization provided for in a collective bargaining agreement by reason of delay or default in the payment of such dues by the employer to the Local Union. . . .

the ballots collected on December 13, 1980 should be counted, they shall be counted under the same conditions and limitations prevailing on December 13, 1980, unless otherwise ordered by this court.

The court conducted evidentiary hearings on plaintiffs' motion for a preliminary injunction for five days in December 1980. On January 9, 1981, counsel for defendants wrote to the court stating "that the union is prepared to hold a new nomination meeting and mail ballot election, with the permission of the Court." On January 15 and 22, 1981, defendants filed stipulations [4] concerning how Local 82 would conduct the new election.

During hearings in January 1981, it became apparent that the parties could not reach an agreement on the terms and conditions under which a new nominations meeting and election would be conducted. On January 30, 1981, plaintiffs filed a "Motion to Amend Complaint to Conform to the Evidence," [5] which sought to add claims that since September 1976 defendants had increased union dues without complying with 29 U.S.C. § 411(a)(3), and that defendants had violated the equal rights and free speech provisions of Title I, 29 U.S.C. § 411(a)(1) & (2) by applying the 24 month rule in a discriminatory fashion and in retaliation for plaintiffs' expression of views critical of the defendant incumbent officers of Local 82. The

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[4] In response to explicit and prolonged inquiry by the court, defendants' counsel stated that the stipulations were not offers of settlement that would have no legal effect if they were not agreed to by plaintiffs, but instead were binding representations to which defendants would adhere regardless of plaintiffs' position. *See* Tr. February 27, 1981 hearing, pp. 9-12. On the basis of these stipulations, defendants argue that plaintiffs' Title I claims are moot and that this court lacks jurisdiction to grant additional relief. *But see* part II-B, *infra*.

[5] Plaintiffs had previously amended their complaint on December 1, 1980 before defendants had filed their answer. *See* Fed. R. Civ. P. 15(a).

motion to amend included an additional prayer for relief requesting that the court declare that

> all dues increases by Local 82 since September 1976 are invalid and that any member of Local 82 is eligible for union office if he is in compliance with the 24 month rule once all his dues payments in excess of $9.00 [the dues rate in effect before September 1976] are credited prospectively towards subsequent dues payments, and he is otherwise eligible for union office.

Defendants opposed the motion to amend, contending that the issues raised by the motion, in particular the legality of dues increases implemented by Local 82 since September 1976, had not been tried by the parties during the hearings on the motion for preliminary injunction. At a hearing on February 27, 1981, the court found that evidence concerning the dues claim had been offered at the earlier hearings, but that the dues claim had not been fully litigated. Because the relief requested on the dues claim would affect candidate eligibility in a new election, the court allowed the motion to amend, and gave the parties an opportunity to present additional evidence at a hearing which was conducted on March 6, 1981. The court also heard argument on defendants' motion to dismiss the amended complaint at the March 6th hearing.

After determining for the reasons set forth in part III-B, *infra*, that a new nominations meeting and election must be conducted under the supervision of a neutral third party, on February 12 and April 21, 1981 the court issued proposed orders concerning the conduct of the election and invited the parties to submit their positions concerning the terms of the order. Extensive discussions on the form of the order were conducted at conferences on February 20 and 27, and April 23, 1981. *See* part V, *infra*. At the conclusion of the latter conference, the parties were given additional time to submit their posi-

tions concerning defendants' request for a stay pending appeal.

The remainder of this memorandum is organized as follows: Part II addresses the jurisdictional issues raised in this action. Part III sets forth the court's findings of fact and conclusions of law concerning the availability of preliminary relief on plaintiffs' claims that the manner in which defendants conducted the November 9, 1980 nominations meeting violated Title I of the LMRDA. The court's findings and conclusions on plaintiffs' dues claim are stated in part IV. Finally, issues relating to the form of the court's order, including defendants' request for a bond and stay pending appeal, are addressed in part V.

II.

Jurisdiction

A. The Impact of Title IV on the Court's Jurisdiction

For the purposes of resolving the jurisdictional questions now before the court, plaintiffs' claim may be divided into four categories:[6] (1) claims that by refusing to allow some of the plaintiffs to attend the November 9, 1980 nominations meeting and refusing to allow other plaintiffs to nominate candidates of their choice for union office in retaliation for plaintiffs' criticism of the incumbent officers, defendants violated Title I of the Act by denying plaintiffs their "equal rights . . . to nominate candidates [and] to attend membership meetings," 29 U.S.C.

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[6] In addition to the claims relevant to the motion for a preliminary injunction, plaintiffs also alleged that defendants disciplined plaintiff Robert Lunnin without complying with the due process requirements set forth in 29 U.S.C. § 411(a)(5), and in retaliation for Lunnin's exercise of his right to free speech guaranteed by 29 U.S.C. § 411(a)(2) (Complaint ¶¶ 51-52). However, on January 15, 1981, the parties informed the court that Teamsters Joint Council 10 overturned the disciplinary sanctions imposed on Lunnin.

§ 411(a)(1),[7] and their rights "to meet and assemble freely with other members, and to express any views . . . [including] . . . views upon candidates . . . ." 29 U.S.C. § 411(a)(2)[8] ("discrimination and free speech claims") (Complaint ¶¶ 43-48); (2) claims that the 24 month rule on its face violates Title I because it has a disparate impact on Local members who pay their dues directly to the Local and claims that defendants applied the 24 month rule in a discriminatory fashion in retaliation for plaintiffs' expression of their views in violation of 29 U.S.C. § 411(a)(1) and (2) ("Title I 24 month rule claims") (Complaint ¶ 50, Amended Complaint ¶¶ 54-55); (3) the claim that the 24 month rule consitutes an unreasonable restriction on nominations and eligibility for union candidacy in violation of Title IV of the LMRDA, 29 U.S.C.

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[7] 29 U.S.C. § 411(a)(1) states that:

> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

[8] 29 U.S.C § 411(a)(2) states that:

> Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organizations his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

§ 481(e)[9] ("Title IV 24 month rule claim") (Complaint ¶ 49); and (4) the claim that defendants increased local dues without complying with 29 U.S.C. § 411(a)(3)[10] ("dues claim") (Amended Complaint ¶ 53).

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[9] 29 U.S.C. § 481(e) states that:

> In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof. Not less than fifteen days prior to the election notice thereof shall be mailed to each member at his last known home address. Each member in good standing shall be entitled to one vote. No member whose dues have been withheld by his employer for payment to such organization pursuant to his voluntary authorization provided for in a collective bargaining agreement shall be declared ineligible to vote or be a candidate for office in such organization by reason of alleged delay or default in the payment of dues. The votes cast by members of each local labor organization shall be counted, and the results published, separately. The election officials designated in the constitution and bylaws or the secretary, if no other official is designated, shall preserve for one year the ballots and all other records pertaining to the election. The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this subchapter.

[10] 29 U.S.C. § 411(a)(3) provides that:

> Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members, except—
>
> (A) in the case of a local labor organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by

Defendants argue that because plaintiffs' discrimination and free speech claims and their Title I and Title IV 24 month rule claims arose out of a dispute concerning a nominations meeting conducted in preparation for a union election, plaintiffs' exclusive remedy is to file a complaint with the Secretary of Labor pursuant to Title IV of the LMRDA, 29 U.S.C. § 481 *et seq.*[11] 29 U.S.C. § 483 states that "[t]he remedy provided by this subchapter [Title IV] for challenging an election already conducted shall be exclusive." *See Dunlop* v. *Bachowski*, 421 U.S. 560,

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majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

[11] 29 U.S.C. § 482(a) gives union members who have exhausted available internal union remedies (or who have invoked internal remedies without obtaining a final decision for "three calendar months") the right to file a complaint with the Secretary of Labor alleging the violation of any provision of 29 U.S.C. § 481 [which sets forth standards and procedures governing nominations and elections for union offices. *See* n. 9, *supra*]. The Secretary is required to investigate such a complaint, "and if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days of the filing of such complaint, bring a civil action . . . to set aside the invalid election . . . and to direct the conduct of an election . . . under the supervision of the Secretary . . . ." 29 U.S.C. § 482(b).

566-67 (1975); *Trbovich* v. *United Mine Workers of America*, 404 U.S. 528, 530-36 (1972).

However, at least with respect to actions challenging pre-election conduct,[12] Title I of the LMRDA establishes an alternative enforcement mechanism for remedying conduct interfering with a member's right to engage in the activities associated with union democracy. 29 U.S.C. § 412 provides that "[a]ny person whose rights secured by the provisions of this subchapter [29 U.S.C. § 411] have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate." *See Kupau* v. *Yamamoto*, *supra* note 12, 622 F.2d at 454-56; James, Union Democracy and the

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[12] There is language in *Dunlop* v. *Bachowski*, *supra*, suggesting that Title I relates only to pre-election conduct:

> Certain LMRDA provisions concerning pre-election conduct, 29 U.S.C. §§ 411-413 and 481(c) are enforceable in suits brought by individual union members. Provisions concerning the conduct of the election itself, however, may be enforced only according to the post-election procedures specified in 29 U.S.C. § 482. Section 483 is thus not a prohibition against judicial review but simply underscores the exclusivity of the § 482 procedures in post-election cases.

421 U.S. at 566-67. Although there is some support for the proposition that section 483 bars a Title I action brought after an election, *see McDonough* v. *Local 825, International Union of Operating Engineers*, 470 F.2d 261 (3d Cir. 1972), such a result is inconsistent with the language of 29 U.S.C. § 411(a)(1) granting union members the equal right "to vote in elections." *See Kupau* v. *Yamamoto*, 622 F.2d 449, 456-57 (9th Cir. 1980). However, this question need not be addressed in the instant case both because the suit is addressed to pre-election conduct, *id.*, and because the court issued its temporary restraining order barring the completion of the election. *But cf. McDonough* v. *Local 825, supra; New Action Coalition* v. *Local 2, United Federation of Teachers*, 510 F. Supp. 1208, 1211 (S.D.N.Y. 1981); *Laski* v. *International Organization of Masters, Mates & Pilots*, 502 F. Supp. 134, 135-36 (S.D.N.Y. 1980) (where ballots had already been sent to local members, 29 U.S.C. § 483 barred suit under Title IV challenging conduct of election.)

LMRDA: Autocracy and Insurgency in National Union Elections, 13 Harv. C.R.-C.L. L. Rev. 247, 269, 316-17 (1978).

In *Calhoon* v. *Harvey*, *supra*, the Supreme Court addressed the relationship between claims arising under Titles I and IV of the LMRDA. There the plaintiffs had alleged that a seamen's union rule providing that to be eligible for nomination or election to union office, a person must have been a member of the union for five years and must have served 180 days or more of sea time aboard qualified vessels in each of two of the three preceding years denied plaintiffs their equal right to nominate candidates in violation of 29 U.S.C. § 411(a)(1). The Supreme Court affirmed the dismissal of the suit by the district court for want of jurisdiction, holding that plaintiffs had failed to state a claim under 29 U.S.C. § 411(a)(1), and "that possible violations of Title IV of the Act regarding eligibility are not relevant in determining whether or not a district court has jurisdiction under [29 U.S.C. § 412]." 379 U.S. at 139-40. In so doing, the Court rejected the plaintiffs' contention that 29 U.S.C. § 411(a)(1) "guarantees members . . . a right to nominate anyone without regard to valid union rules," holding that the provision "is no more than a command that members and classes of members shall not be discriminated against in their right to nominate and vote." *Id.* at 138-39.

Plaintiffs argue that even though *Calhoon* v. *Harvey* precludes a federal court from taking jurisdiction pursuant to 29 U.S.C. § 412 of an action based solely on violations of Title IV of the Act, the court should exercise "pendent jurisdiction" over plaintiffs' Title IV claim in order to avoid multiple proceedings arising out of the same controversy because plaintiffs' Title I claims already provide a sufficient basis for jurisdiction under 29 U.S.C. § 412. Although such a result would fulfill the Congressional objective of centralizing "in a single proceeding such litigation as might be warranted with respect to a single election," *Trbovich* v. *United Mine Workers*,

supra, 404 U.S. at 532, the proposition that individual union members may bring a pre-election suit challenging union regulations on Title IV grounds was rejected in *Calhoon* v. *Harvey*, *supra*, 379 U.S. at 140:

> Section 402 of Title IV [29 U.S.C. § 482] . . . *sets up an exclusive method for protecting Title IV rights*, by permitting an individual member to file a complaint with the Secretary of Labor challenging the validity of any election because of violations of Title IV. Upon complaint the Secretary investigates and if he finds probable cause to believe that Title IV has been violated, he may file suit in the appropriate district court. It is apparent that Congress decided to utilize the special knowledge and discretion of the Secretary of Labor in order best to serve the public interest. . . . *In so doing Congress . . . decided not to permit individuals to block or delay union elections by filing federal-court suits for violations of Title IV.*

(Emphasis supplied, citation and footnote omitted.) Therefore, applying the principles articulated in *Calhoon* v. *Harvey* to the instant case, I conclude that this Court lacks jurisdiction over plaintiffs' Title IV 24-month rule claim, as well as their claim that the 24-month rule on its face violates Title I because it necessarily "discriminates" against "spares," *i.e.*, members of the union who are not regular full-time employees and who therefore are very unlikely to be on "check-off" and to pay their dues on time each month. In *Calhoon*, the Supreme Court considered and rejected this latter claim that "discrimination" based on the "disparate impact" of a uniformly applied rule upon union members states a violation of Title I:

> It is true [the plaintiffs] were denied their request to be candidates, but that denial was not a discrimination against their right to nominate [themselves], *since the qualifications were required equally of all members.*

Id. at 139 (emphasis supplied). *See Driscoll* v. *International Union of Op. Eng., Local 139*, 484 F.2d 682, 688-89 (7th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974).

However, I conclude that this court does have jurisdiction over plaintiffs' other discrimination and free speech claims, including their claims that defendants applied the 24 month rule in a discriminatory fashion in retaliation for plaintiffs' exercise of their right to speak freely. Where "a union member has been discriminated against in the exercise of his Title I rights," a federal court has jurisdiction over his Title I claims under 29 U.S.C. § 412, regardless of whether the member may also have claims arising under Title IV. *Kupau* v. *Yamamoto*, *supra*, 622 F.2d at 455; *McNail* v. *Amalgamated Meat Cutters & Butcher Workmen of North America*, 549 F.2d 538, 540-51 (8th Cir. 1977); *Schonfield* v. *Penza*, 477 F.2d 899 (2d Cir. 1973); *Depew* v. *Edmiston*, 386 F.2d 710 (3d Cir. 1967). *See also Bunz* v. *Moving Picture Machine Operators, Local 224*, 567 F.2d 1117, 1120-24 (D.C. Cir. 1977).

B. The Effect of Defendants' Stipulation

Defendants argue that because of their binding stipulation that they will conduct a new nominations meeting and election, *see* note 4, *supra*, plaintiffs' remaining Title I claims involving the disputed election are moot, and therefore this court lacks jurisdiction to enter a preliminary injunction.[13] Defendants' argument is plainly without merit. "[T]he voluntary cessation of allegedly illegal conduct . . . does not make [a] case moot," *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953), unless the

[13] Because plaintiffs have requested costs and attorney's fees, which this court, in its discretion, may award to prevailing plaintiffs in Title I actions, *Hall* v. *Cole*, 412 U.S. 1 (1973), the court would still have jurisdiction over plaintiffs' Title I election claims even if injunctive relief were no longer available because of a change in circumstances. *See* 13 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure § 3533, at 273 (1975) (collecting cases).

defendant can meet its "heavy" burden of demonstrating that "there is no reasonable expectation that the wrong will be repeated." *Id.* at 633 (footnote omitted); *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979). Where a defendant has voluntarily terminated unlawful conduct after litigation has commenced, "[t]he case should not be held moot unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Seay* v. *McDonnell Douglas Corp.*, 533 F.2d 1126, 1130 (9th Cir. 1976), (quoting *Pacific Maritime Ass'n* v. *International Longshoremen & Warehousemen's Union*, 454 F.2d 262 (9th Cir. 1971)). Because I conclude that plaintiffs have established a substantial likelihood that defendants violated Title I less than two months before offering their stipulation, *see* part III-B, *infra*, and defendants have a personal interest in retaining office in the forthcoming election, I cannot find that future violations of Title I could not reasonably be expected to occur. *See Lodge 1380, Brotherhood of Railway, Airline and Steamship Clerks* v. *Dennis*, 625 F.2d 819, 822-23 (9th Cir. 1980). Therefore, defendants' stipulation does not moot this case or deprive the court of power to grant injunctive relief.

C. Plaintiffs' Failure to Exhaust Internal Union Remedies

Defendants argue that the court lacks jurisdiction over this action because plaintiffs have failed to exhaust available internal union remedies.[14] "[W]hether or not a plain-

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[14] 29 U.S.C. § 411(a)(4) states that:

> No labor organization shall limit the right of any member thereof to institute an action in any court . . . *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof . . . .

tiff will be required to utilize his internal union appeals is a matter within the discretion of the trial judge." *Semancik* v. *United Mine Workers of America, District #5*, 466 F.2d 144, 150 (3d Cir. 1972). A plaintiff's failure to exhaust available internal remedies will be excused in three situations: (1) where the right of appeal would be "inadequate, illusory or futile," *Keefe Bros.* v. *Teamsters Local Union No. 592*, 562 F.2d 298, 303 (4th Cir. 1977); (2) where local members do not receive adequate notice of the administrative remedies available to them, *Steib* v. *New Orleans Clerks & Checkers Local No. 1497*, 436 F.2d 1101, 1106 (5th Cir. 1971); and (3) where irreparable harm to the plaintiff will result which will adversely affect his or her employment or the exercise of rights secured by the LMRDA. *Semancik, supra*, 466 F.2d at 150-51; *Bradford* v. *Textile Workers of America, AFL-CIO*, 563 F.2d 1138, 1140-41 (4th Cir. 1977).

In the instant case, plaintiffs filed a protest concerning the conduct of the nominations meeting with Local 82, with Teamsters Joint Council 10 (which is the regional body containing Local 82), and with the International Union. On November 20, 1980, Local 82 denied the election protests. This action was filed December 1, 1980. A hearing before Joint Council 10, scheduled for December 23, 1980, was canceled "because of legal action pending in the United States District Court." To date, no

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Article XIX, § 12(a) of the International Constitution provides that:

> Every member, officer, elected Business Agent, Local Union, Joint Council or other subordinate body against whom charges have been preferred and disciplinary action taken as a result thereof, or against whom adverse rulings or decisions have been rendered or who claims to be aggrieved, shall be obliged to exhaust all remedies provided for in this Constitution and by the International Union before resorting to any court, tribunal or agency against the International Union, any subordinate body or any officer or employee thereof.

action has been taken on the protests by either Joint Council 10 or the International Union.

In addition, plaintiffs do not dispute that they failed to pursue any of the intra-union remedies that may[15] exist for challenging the legality of dues increases implemented since September 1976. However, plaintiffs' dues claim is essentially simply a claim that in fashioning preliminary relief for defendants' failure to conduct the nominations meeting in accordance with Title I, this court should not enforce eligibility criteria that rely upon a dues formula which, they contend, violates 29 U.S.C. § 411(a)(3). Because ordering a new election is necessary to prevent irreparable harm to plaintiffs' free speech rights within the union, *see* part III-B, *infra; Bradford* v. *Textile Workers*, *supra* 563 F.2d at 1140-41, the court concludes that plaintiffs' failure to exhaust all internal union remedies before filing this action does not bar their claims for relief.

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[15] Plaintiffs contend that no internal union remedy is available for challenging the dues increases at issue here. Article XIX of the International Constitution establishes the procedures by which charges may be brought against "members, officers, elected Business Agents, Local Unions, Joint Councils or other subordinate bodies" for "[v]iolation of any specific provision of the Constitution or failure to perform any of the duties specified thereunder." Art. XIX, § 6(1). In the absence of any evidence that the procedures set forth in article XIX are inadequate, the court must conclude that the provision does create a means for securing relief from a dues increase implemented in violation of article X, section 3 of the International Constitution. However, defendants have not offered evidence that any procedure exists by which a union member may dispute the legality of a provision of the International Constitution. In light of article III, section 1 of the International Constitution, which states that "The International Constitution shall be the supreme governing authority of the International Union . . . ," and the position taken by the defendants in this action, any attempt to pursue an internal union remedy challenging the legality of article X, section 3 of the International Constitution under 29 U.S.C. § 411(a)(3) is likely to be futile.

III.

Plaintiffs' Claims Concerning The Nominations Meeting

A. Findings of Fact

During the two months before the November 9, 1980 nominations meeting, several of the plaintiffs were outspokenly critical of the incumbent officers of Local 82 and encouraged other members to attend union meetings. At the September 1980 meeting of Local 82, plaintiff Robert Lunnin demanded that the forthcoming union elections be conducted by open ballot instead of the mail-in procedure used by Local 82. Lunnin, plaintiff Anthony Coyne, and others obtained over 100 signatures on petitions demanding "an open free election done in the democratic process," and submitted them to Local 82's Executive Board. On September 16, 1980, the Executive Board decided to conduct the election by mail ballot. In addition, at the September 1980 meeting of the Local, plaintiffs John Lynch, James Hayes, and Lunnin criticized the incumbents for not distributing copies of the International Constitution to members of Local 82. As a result of their dissatisfaction with the incumbents, several of the plaintiffs, including John Lynch, announced their intention to seek office in the upcoming election.

Notices of the November 9, 1980 nominations meeting were not sent to the members of Local 82 as required by article VI, § 2 of the Local By-laws.[16] Instead, notices

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[16] Article VI, § 2 provides:

> Notice of Rules, Nominations, Meeting and Election. At least twenty (20) days prior to the date of the nomination meeting, specific notice of the date, time, and place of the nomination and the offices to be filled shall be mailed or shall be published in any Local Union publication mailed to the membership (except that the notice of nominations, and election may be combined); each member shall be advised in such notice that the election rules are set forth in the By-Laws which are available upon request.

Plaintiffs contend that defendants' failure to comply with this provision violated 29 U.S.C. § 411(a)(1) by denying them their equal

were sent to shop stewards at the various companies employing Local members (which are known as "barns") to be posted where they could be seen by members. As was the practice for notices of regular monthly meetings, the notice of the November 9, 1980 meeting included the statement that "members must have their receipts on their person and be paid for the month of Oct." [the preceding month].

Members arriving at the November 9, 1980 nominations meeting were informed at the door by defendant George Harris that no member would be allowed inside unless he could produce his "TITAN" computerized dues receipt indicating he had paid his dues through the previous month.[17] This announcement provoked an uproar among those assembled outside the meeting, who claimed that in the past members had been allowed into Local meetings after either presenting a "temporary" dues receipt signed by their shop steward or paying at the door. Shop stewards at the scene offered to receive dues at the door and give members temporary receipts. However, defendants refused to accept anything other than computerized dues receipts. Defendants Griffiths and Harris, as well as witnesses Kenneth Sprague and John Perry, testified that no

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right to nominate candidates. However, because there is no evidence that defendants *discriminatorily* sent notices to some but not all Local members, plaintiffs have not established a Title I violation. *See* part II-A, *supra*.

[17] Local 82 maintained two systems for crediting members' dues payments. A member on "checkoff," *i.e.*, one who authorized his employer to deduct his union dues from his wages and forward them to Local 82, received a "computerized dues receipt" from the International Union's TITAN computer indicating the date and amount of payment and the month through which the member's dues had been paid. A member who is not on "checkoff" typically pays his dues to a shop steward, who gives him a "temporary" dues receipt and forwards the dues to the Local office. The Local then credits the dues payment to the member's account and forwards a computerized dues receipt to the member. *See* n. 22, *infra*.

member had been allowed into previous Local meetings without showing a computerized dues receipt. In light of the uproar caused by the announcement, the absence of any rule requiring that a computerized dues receipt be shown [18] to enter a Local meeting, and the more credible testimony of several witnesses that no such requirement had existed before November 1980, I find that members of Local 82 had not previously been required to show a computerized dues receipt to enter union meetings.

In contrast with the manner in which the dues requirement was applied to the members of Local 82, members of the Local's Executive Board were allowed into the nominations meeting without producing a receipt of any kind. According to defendant Griffiths, this was because he had made an independent examination of their dues records. However, at the same time, plaintiff Jerome Crowley was denied admission to the nominations meeting even though defendant Griffiths had in his possession a computer printout indicating that plaintiff Crowley was fully up to date in his dues payments.

The meeting was conducted amidst loud shouting and arguments among members of the Local. There was conflicting testimony concerning what occurred at critical moments. Based on the evidence before me, I find that the following occurred at the meeting:[19]

Defendant Harris called the meeting to order and turned the meeting over the defendant Griffiths. After

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[18] Article VI, § 3(a) of the Local By-laws states only that

> Every member whose dues are paid up through the month which is prior to the months in which the nominations or election is held shall have the right to nominate, vote for, or otherwise support the candidate of his choice.

[19] In making these findings on disputed factual issues, I am conscious that in some respects they are directly contradicted by the testimony of defendants Griffiths, Harris, and Piemontese, which in these respects I do not credit.

waiving the ordinary business, Griffiths announced that the Local would conduct nominations for the upcoming election. Griffiths announced that a Local By-law, article VI, section 3(b), allowing only members who had attended 50% of the meetings during the previous two years to be candidates for Local office would be "waived" for the 1980 election.[20] Then Griffiths explained the 24 month rule to the members and read lists of "ineligible" and "eligible" candidates. Plaintiffs Anthony Coyne and Robert Lunnin were at the top of the list of persons declared ineligible, which also included plaintiffs James Hayes and Jerome Crowley. Among those listed as eligible to run were the individual defendants Griffiths, Harris, and Piemontese and plaintiff Lynch, as well as Wilfred Pye, William Pye, Paul McGuire, and Joseph Crowley, all of whom held positions in the Local or were supporters of the incumbents.[21] When Griffiths finished reading from the eligibility lists, the members erupted with anger over the limited number of persons eligible to run. Griffiths was asked about the eligibility of the other "700" members in the union, and did not respond. After the tumult subsided, Griffiths opened the nominations for secretary-treasurer, the position he then held. George Harris nominated Griffiths for a second term. The nomination was seconded. Griffiths then asked for additional names, and quickly began to close the nominations as plaintiff Lynch stood up and stated, "Wait a minute. You're going too fast. Am I eligible?" Griffiths briefly refused to recognize Lynch before answering in the affirmative. Then, plaintiff Joseph Cook nominated Lynch for secretary-

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[20] In waiving the 50% meeting attendance requirement, defendant Griffiths relied on *Local 3489, United Steelworkers of America* v. *Usery*, 429 U.S. 305 (1977), in which the Supreme Court held that such a rule violated 29 U.S.C. § 481(3) where it disqualified 96.5% of a local's members.

[21] In all, Griffiths read off the names of 12 persons declared ineligible and 16 persons declared eligible to run for local office. Their names are listed in Plaintiffs' Exhibit 1.

treasurer. Plaintiff Hayes seconded the nomination. Griffiths then closed the nominations for secretary-treasurer and conducted the nominations for the other offices that were to be filled in the upcoming election.

At the conclusion of the nominations, Griffiths announced he would read the list of candidates for Local offices. Griffiths read only his own name for the office of secretary-treasurer and declared himself duly elected. Griffiths read off three candidates for president: defendant Harris, plaintiff Lynch, and John Perry. Once again the meeting erupted when several members attempted to inform Griffiths that Lynch had been nominated for Secretary-Treasurer. Griffiths responded, "I'm running unopposed," and adjourned the meeting.

Based on the foregoing findings, and other evidence introduced at the hearings, I make the additional finding that both before and during the nominations meeting on November 9, 1980, defendants Griffiths and Harris deliberately attempted to deny plaintiffs their rights to nominate candidates, attend membership meetings, and participate in the deliberations of such meetings, and their rights to meet and assemble freely with other members and express their views.

B. Conclusions of Law

In a recent case arising under Title I of the LMRDA, the Court of Appeals recognized that a plaintiff, "on a motion for preliminary injunction, must show that 'in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits.'" *Maceira* v. *Pagan*, No. 80-1622, slip op. at 10-11 (1st Cir. May 13, 1981) (quoting *Nat. Tank Truck Carriers, Inc.* v. *Burke*, 608 F.2d 819, 823 (1st Cir. 1979) (quoting *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 (1975)). In addition, plaintiff must establish that the injury plaintiff will suffer if an injunction is not granted outweighs any harm that granting injunctive relief would inflict on the

defendant, and that the public interest will not be adversely affected by the granting of preliminary relief. *Planned Parenthood League of Massachusetts* v. *Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981).

1. Likelihood of Success on the Merits

Based on the findings of fact stated above, I conclude that plaintiffs have shown a substantial likelihood of prevailing on their claims that defendants violated 29 U.S.C. § 411(a)(1) by denying plaintiff Jerome Crowley and others their equal right to attend membership meetings and nominate candidates through the imposition of a suddenly announced computerized dues receipt requirement for entry into the nominations meeting and the application of such requirement in a discriminatory fashion. In addition I conclude that plaintiffs are likely to prevail on their claim that the computerized receipt requirement was imposed in retaliation for plaintiffs' expressed intention to nominate candidates to oppose the incumbent Local officers and with the objective of suppressing dissent within the Local, in violation of 29 U.S.C. § 411(a)(2).

I also conclude that plaintiffs have established a substantial likelihood of prevailing on their claim that defendant Gritffiths violated 29 U.S.C. § 411(a)(1) and (2) by refusing to allow plaintiff Lynch to run against him for the office of secretary-treasurer.

Finally, I conclude that there is not a substantial likelihood that plaintiffs will establish that the defendants applied the 24-month rule in a discriminatory fashion in retaliation for plaintiffs' exercise of their free speech rights under 29 U.S.C. § 411(a)(2). Although plaintiffs contend that defendant Griffiths declared supporters of the incumbents eligible despite their late payment of dues, the supporters in question were on check-off during the months in which they made late dues payments. Because 29 U.S.C. § 481(e) requires that union members on check-off not be declared ineligible for office due to delays

resulting from late payment by withholding employers, *see* note 9, *supra*, there is no evidence to support a finding that defendants favored their supporters when applying the 24-month rule.[22]

2. Irreparable Injury

If preliminary relief ordering that a new nominations meeting and election be held is denied, plaintiffs will remain in a Local in which incumbent officers continue to hold office despite their likely violations of Title I. Such an outcome will send an implicit message to Local members that union leaders can unlawfully move to stifle dissent within the Local and yet continue to enjoy the benefits of union office. The resulting "chilling effect" on the exercise of the members' right of free expression constitutes irreparable harm. *Macera* v. *Pagan*, *supra*, slip op. at 11. *See Schonfeld* v. *Penza*, *supra*, 477 F.2d at 903-04; "[F]ederal courts need not necessarily wait to intervene until some sanction is directly imposed on union dissidents, for once suppressed 'the democratic spirit' within a union 'may not soon be revived,'" (quoting *Navarro* v. *Gannon*, 385 F.2d 512, 520 (2d Cir. 1967), *cert. denied*, 390 U.S. 989 (1968).

3. Weighing Harm to Defendants

The court is well aware of the substantial burden imposed on Local 82 by a preliminary injunction ordering a new election, and would be reluctant to order such relief if defendants had not been given the opportunity to present all of their evidence in opposition to plaintiffs' request. However, the court gave defendants such an oppor-

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[22] In the upcoming election, defendants have offered to end one aspect of the allegedly discriminatory application of the 24-month rule. Local 82 has agreed to credit a dues payment made by a member not on check-off as soon as the payment is received by a shop steward, thereby affording members not on check-off a treatment similar to that received by members on check-off. *See* n. 17, *supra*.

tunity, hearing evidence for five days in December 1980 and an additional day in March 1981. Because of the full hearing afforded to the parties, it is less likely that additional evidence would be produced at trial that will alter the findings and conclusions stated herein. Therefore, I conclude that the irreparable harm that plaintiffs will suffer if injunctive relief is denied outweighs the burden imposed on defendants by the preliminary injunction.

4. Public Interest

In *Navarro* v. *Gannon*, the court described Congress' objective in adopting Title I as follows:

> The LMRDA was enacted with the clear purpose of assuring "the full and active participation by the rank and file in the affairs of the union." The Congress by passing a "Bill of Rights" for union members determined that the efficiency of a monolithic union under autocratic rule was gained at too great a price if it necessitated any sacrifice in the members' rights to determine the course of their organization. The balance was struck in favor of union democracy. Only a union responsive to the rights of all its members can achieve the ideals of responsibility, opportunity and self-determination that are recognized as fundamental values in the labor movement.

385 F.2d at 518 (citation omitted) (quoting *American Federation of Musicians* v. *Wittstein*, 379 U.S. 171, 182-83 (1964)).

In examining the request for preliminary relief, the court is well aware that in adopting the Act, Congress did not intend to permit "wholesale judicial intervention" in the affairs of unions. *See Packer* v. *International Brotherhood of Teamsters*, 428 F. Supp. 145, 148 (W.D. Pa. 1977). However, where, as here, the mechanisms of union self-government have been tainted by conduct that undermines the Congressional goal of union democracy, this

court must conclude that granting the preliminary injunction will serve the public interest.

IV.

DUES CLAIM

A. Findings of Fact

On February 27, 1981, the court allowed plaintiffs' motion to amend the complaint to add, *inter alia*, a claim that all dues increases implemented by Local 82 since September 1976 were adopted in violation of 29 U.S.C. § 411(a)(3). *See* note 10, *supra*. Defendants have moved to dismiss the amendments to the complaint.

The relevant facts are not in dispute.[23] Before October 1, 1976, the monthly membership dues rate for members of Local 82 was $9.00. By-laws art. VII, § 5. At a convention in June 1976, the International Union adopted[24] its 1976 International Constitution, which provides for mandatory increases in the monthly dues of members of the International Union, Article X, section 3(d) of the International Constitution states that:

> Dues of members of the International Union, payable through their respective Local Unions, shall not be less than eight dollars ($8.00) per month. . . .
>
> All dues, whether below, at or above the minimum of eight dollars ($8.00) shall be increased by no less than two dollars ($2.00) per month effective October

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[23] The court's statement of the facts is a summary of the undisputed portions of Defendants' Proposed Findings of Fact with Regard to the Issues Raised by the Second Amended Complaint, stipulations made at the March 6, 1981 hearing, and the testimony and exhibits received during the hearings in this action.

[24] Plaintiffs do not contend that the June 1976 convention was unlawfully convened, or that any procedural irregularity invalidates the convention's adoption of the International Constitution.

1, 1976, and an additional one dollar ($1.00) per month effective October 1, 1977. In addition, members whose rate of dues on October 1, 1977 is less than two times their hourly earnings shall have their monthly dues increased up to the equivalent of two times their hourly earnings or by an additional one dollar ($1.00), whichever is a lesser amount. Effective October 1, 1978, and each October 1 thereafter, members whose rate of dues is less than two times their hourly earnings shall have their monthly dues increased up to the equivalent of two times their hourly earnings or by two dollars ($2.00) per month, whichever is a lesser amount.

* * *

After the increases provided above, dues shall be set on October 1 of each subsequent year on the basis of attaining a dues rate equivalent to twice the hourly earnings . . . .

On October 1, 1976, Local 82 increased[25] the monthly dues of its members by two dollars to $11. The two dollar increase is consistent with the formula set forth in Article X, section 3.

On October 1, 1977, Local 82 raised the monthly dues of all members from $11 to $12. Because the average hourly earnings of a member of Local 82 were then $6.45, under the terms of Article X, section 3,[26] the Local's monthly dues were required to be $13.

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[25] It is not clear from the materials before the court whether the October 1976 dues increase, and the subsequent dues increases, resulted from a vote of the Executive Board of Local 82 or from an action by one or more of its officers. However, neither party contends that the dues increases implemented by Local 82 were enacted in compliance with 29 U.S.C. § 411(a)(3)(A). *See* n. 10, *supra*.

[26] Article X, section 3 provides: "When calculating the rate of monthly dues based on two times the hourly earnings, the hourly earnings shall be doubled and rounded to the nearest whole dollar."

On October 1, 1978, Local 82 raised the monthly dues of all [27] its members to $13. Because the average hourly earnings at that time were $6.70, the October 1978 dues rate was consistent with that required by the International Constitution.

On June 1, 1979, Local 82 raised the monthly dues rates for members employed at twelve moving companies by either one or two dollars to $14 or $15, depending upon the member's wage rate. Similarly, on August 1, 1979, Local 82 increased the monthly dues rates for members employed at two other companies by one or two dollars.

On October 1, 1979, Local 82 increased the monthly dues of all remaining members whose wage rates had increased since April 1979 by one or two dollars to $14.00 or $15.00, again depending on their wage rate. Under the terms of Article X, section 3, and the average hourly wage rates in effect in October 1979, all members of Local 82 were required to pay $15.00 per month.

Local 82 increased the monthly dues of additional members employed by companies that had not implemented wage increases before October 1979 on November 1 and December 1, 1979, and on January 1, 1980. By March 1980, all members of Local 82 were paying monthly dues of either $13, $14, or $15, depending on their hourly earnings rates. On April 1, 1980, the monthly dues of all members was set at $15.

Although on October 1, 1980 the average hourly earnings for Local 82's members was $7.92, which under Article X, section 3 would have required a $16 monthly dues rate, the $15 monthly rate established on April 1, 1980 remains in effect.

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[27] Apparently a few employers failed to implement the increase for a number of Local 82 members who were on check-off until the following month.

B. Conclusions of Law

Plaintiffs advance two arguments in support of their claim that the dues increases implemented by Local 82 violate 29 U.S.C. § 411(a)(3). Their first contention is the Article X, section 3 of the International Constitution and 29 U.S.C. § 411(a)(3)(B)(1) do not authorize a local union to increase membership dues without a majority vote of its members. 29 U.S.C. § 411(a)(3)(A). Alternatively, plaintiffs argue that even if the International Constitution and 29 U.S.C. § 411(a)(3)(B)(i) authorize Local 82 to implement annual dues increases without a vote of the membership, the Local's failure to comply with the requirements of Article X, section 3 invalidates the increases instituted from October 1977 through the present. Plaintiffs seek a declaration that all dues increases adopted by Local 82 since September 1976 are invalid, and that any member who is otherwise eligible may hold Local office "if he is in compliance with the 24 month rule once all his dues payments in excess of $9.00 per month are credited prospectively toward subsequent dues payments."

1. Defendants' Motion to Dismiss

Defendants have moved to dismiss the dues claim on four grounds.[28] Their first contention is that because the disposition of plaintiffs' claim that Article X, section 3 of the International Constitution does not authorize a local union to increase membership dues, may adversely affect the interest of the International Union, the court must join the International Union as a party or dismiss the claim.

In relevant part, Rule 19(a) provides that:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdic-

[28] Defendants' fourth ground for dismissal, plaintiffs' failure to exhaust internal union remedies, is discussed at pp. 12-14, *supra*.

> tion over the subject matter of the action shall be joined as a party in the action if . . . (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest . . . . If he has not been joined, the court shall order that he be made a party.

Two courts have held that in an action in which the validity of a provision of a union constitution is challenged, Rule 19 requires the union to be joined as a party. *Krulikowsky* v. *Metropolitan District Council*, 270 F. Supp. 122 (E.D. Pa. 1967); *Kennan* v. *Metropolitan District Council*, 266 F. Supp. 497, 499 (E.D. Pa. 1966) ("The Brotherhood has a definite interest in maintaining the integrity of the laws of its organization, and unless it is brought into court, it would be running the risk of the Court's holding part of those laws invalid without having been a party to the suit."). Because the provision challenged by plaintiffs herein governs dues rules in effect throughout the United States, the International Union's interests may be drastically impaired by a determination that Article X, section 3 violates 29 U.S.C. § 411(a)(3). Therefore, if at the next conference in this case plaintiffs state that they wish to press their challenge to the provision, the court will require plaintiffs to show cause why the court should not order that the International Union be joined as a party defendant. However, because plaintiffs have failed to show a probability of success on the merits of their challenge to Article X, section 3, *see* pp. 29-32, *infra*, the court need not delay the granting of other preliminary relief pending resolution of that issue. But because defendants have failed to show that the International Union cannot be made a party, their motion to dismiss for failure to join an indispensable party will be denied. Fed. R. Civ. P. 19(a).

Second, defendants contend that to the extent that plaintiffs' dues claim challenges actions taken by the In-

ternational Union or Local 82 more than three years before the filing of this litigation, it is bound by Massachusetts' three year statute of limitations for tort actions. Mass. Gen. Laws ch. 260, § 2A.[29] Plaintiffs argue that the applicable statute of limitations is the six year period of contract actions set forth in Mass. Gen. Laws ch. 260, § 2.[30]

Because there is no applicable federal statute of limitations for actions arising under Title I of the LMRDA, the federal courts must look to state law for the appropriate limitations period. *Berard* v. *General Motors Corp.*, 493 F. Supp. 1035 (D. Mass. 1980). In determining which state limitations period to apply, "the federal courts will look to the state statute or remedy 'most analogous' to the particular . . . cause of action." *Burns* v. *Sullivan*, 619 F.2d 99, 105 (1st Cir. 1980) (quoting *Runyan* v. *McCrary*, 427 U.S. 160, 180 (1976)). "The most analogous state law will be applied unless it is 'inconsistent with the federal policy underlying the cause of action under consideration." *Burns* v. *Sullivan*, *supra*, 619 F.2d at 105 (quoting *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 465 (1975)).

Under Massachusetts law, a court must look "to the 'gist of the action' or the essential nature of the plaintiff's claim," in determining what statute of limitations to apply. *Hendrickson* v. *Sears*, 365 Mass. 83, 85, 310 N.E.2d 131, 132 (1974).

When characterizing an action under 29 U.S.C. § 411 (a)(3), courts have recognized that although the rights

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[29] "Except as otherwise provided, actions of tort, actions of contract to recover for personal injuries, and actions of replevin, shall be commenced only within three years next after the cause of action accrues."

[30] "Actions of contract, other than those to recover for personal injuries, founded upon contracts or liabilities, express or implied . . . shall, except as otherwise provided, be commenced only within six years next after the cause of * * *

established by the LMRDA are statutory, not contractual, *Copitas* v. *Retail Clerks International Ass'n*, 618 F.2d 1370, 1372 (9th Cir. 1980), the dominant form of relief sought, restitution of unlawfully collected dues, is quasi-contractual in nature. *Dantagnan* v. *ILA Local 1418*, 496 F.2d 401, 402-03 (5th Cir. 1974). *See Peck* v. *Associated Food Distributors of New England, Local 138*, 237 F. Supp. 113, 115 (D. Mass. 1965). Thus, in *Dantagnan*, the Fifth Circuit held that Louisiana's statute of limitations for actions in quasi-contract applied to an action brought under 29 U.S.C. § 411(a)(3) because appellants sought restitution of unlawfully collected dues, as well as declaratory and injunctive relief, but not "damages for the wrongful act of collection." *Id.* at 403 n.6.

The same result is required under Massachusetts law. "The usual form of action to recover from another money which in equity and good conscience he is not entitled to keep is in contract." *Kagan* v. *Levenson*, 334 Mass. 100, 103, 134 N.E.2d 415 (1956). *See also New Bedford* v. *Lloyd Investment Assoc., Inc.*, 363 Mass. 112, 292 N.E.2d 688 (1973) (holding than an action to recover payments made by mistake was "quasi-contractual," and applying Massachusetts' six year statute of limitations for contracts actions). In the instant case, although plaintiffs seek only a declaration that the dues increases implemented by Local 82 since September 1976 violated 29 U.S.C. § 411(a)(3), the essence of their claim is the contention that defendants unlawfully collected dues payments. Therefore, the six year statute of limitations for actions of contract applies to plaintiffs § 411(a)(3) claim, and defendants' motion to dismiss on statute of limitations grounds will be denied.

Defendants' third contention is that laches bars plaintiffs' dues claim. An action is barred by laches only when there has been unreasonable delay in seeking relief that has resulted in prejudice to the defendant. *Gardner* v. *Panama R. Co.*, 343 U.S. 29, 31 (1951); *Cities Service Oil*

Co. v. *Puerto Rico Lighterage Co.*, 305 F.2d 170 (1st Cir. 1962). Because laches is an affirmative defense, Fed. R. Civ. P. 8(b), and both the length of the delay and the existence of prejudice to the defendant are questions of fact, *Churma* v. *United States Steel Corp.*, 514 F.2d 589, 593 (3d Cir. 1975), ruling on the merits of a claim of laches raised by a motion to dismiss is inappropriate. *See Morgan* v. *Sharon Pennsylvania Board of Education*, 472 F. Supp. 1157, 1160 (W.D. Pa. 1979). Therefore, the motion to dismiss the dues claim on laches grounds will be denied.[31]

2. Probability of Success on the Merits

Plaintiffs assert two legal theories in support for their claim that defendants violated 29 U.S.C. § 411(a)(3). *See* note 10, *supra*. First, citing *Mori* v. *International Brotherhood of Boilermakers*, 482 F. Supp. 838 (N.D. Cal. 1979), plaintiffs contend that 29 U.S.C. § 411(a)(3) prohibits Local 82 from increasing membership dues in accordance with Article X, section 3 of the International Constitution without a majority vote of its members as required by 29 U.S.C. § 411(a)(3)(A). Defendants assert that *Mori* was incorrectly decided, and that 29 U.S.C. § 411(a)(3)(B)(i) authorizes an international union to increase the dues of members of the international union payable through their local unions "by majority vote of the delegates voting at a regular convention . . . ." *Id.*

Mori held that a complaint alleging that at its regular convention an international union had enacted a dues provision requiring "field construction members" to make a supplemental payment to their local in addition to their regular local dues stated a claim for relief under 29 U.S.C. § 411(a)(3). The court declared that 29 U.S.C. § 411(a)(3)

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[31] However, in considering plaintiffs' request for preliminary relief on the dues issue, the court has considered the laches question. *See* pp. 32-33, *infra*.

> states clearly that dues payable to a local labor organization may be increased only according to the methods provided in Section 411(a)(3)(A), and not by the regular convention of an international. Section 411(a)(3)(B) establishes the methods for increasing dues payable to 'a labor organization *other than* a local labor organization . . . .'

482 F. Supp. at 841 (quoting 29 U.S.C. § 411(a)(3)(B) (emphasis in original opinion).

In the instant case, Article X, section 3(d) of the International Constitution purports to set "[*d*]*ues of members of the International Union, payable through their Local Unions* . . . " (emphasis supplied). Thus, here as in *White* v. *Local No. 207, Laborers International Union*, 387 F. Supp. 53 (W.D. La. 1974), an international union has enacted an "across the board" increase in dues to be paid by all its members to their local unions. An international union's authority under 29 U.S.C. § 411(a)(3)(B)(i) to adopt such an across the board increase at its regular convention is well-established. *See id.*, at 56; *Local No. 2, International Brotherhood of Telephone Workers*, 362 F.2d 891 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966); *Ranes* v. *Office Employees, Local 28*, 317 F.2d 915 (7th Cir. 1963). *See also King* v. *Randazzo*, 346 F.2d 307 (2d Cir. 1965); *White* v. *King*, 319 F. Supp. 122 (E.D. La. 1970) (both holding that 29 U.S.C. § 411(a)(3)(B) authorizes an intermediate union to establish the dues rates payable to the intermediate union by its members).

In *Local No. 2, supra*, a local challenged an increase in the minimum local dues that was implemented by the international after a referendum by the membership of its constituent locals. The increase was also later enacted "retroactively" by a vote at the international's convention. After holding that the initial referendum violated 29 U.S.C. § 411(a)(3)(A), the Court of Appeals for the First Circuit upheld the plaintiff's contention that the international convention's action could not retroactively vali-

date an increase that was initially void. However, in so doing the court stated that "[t]here is no doubt that under the statute this convention could validly vote a general dues increase effective prospectively and to this extent we uphold its action." 362 F.2d at 896 (footnote citing 29 U.S.C. § 411(a)(3)(B)(i) omitted).

The rationale for allowing an international union to increase the minimum dues rate payable to its locals was set forth in *Ranes* v. *Office Employees International Union*, *supra*, in which the Court of Appeals for the Seventh Circuit held that by a vote at its regular convention an international may establish the minimum and maximum dues that locals may collect from their members. After examining the legislative history of the LMRDA, which it found was silent on the issue, the court concluded that 29 U.S.C. § 411(a)(3)

> embodies congressional recognition of the existence of a sphere of interest in both international and local unions in the area of membership dues. Traditionally, international unions have exercised primary jurisdiction over affairs of their affiliated local unions, including the control of the local dues structure sufficient to insure the financial health of the union structure. Many international unions exercise control in the latter sphere of interest by the device of prescribing the minimum rate for the dues which each of their locals shall collect from its members. We cannot assume that Congress was unaware of the traditional structure and dues practice of labor unions when it enacted [29 U.S.C. § 411(a)(3)], or that Congress, being aware of the traditional structure and practices, intended by enacting that Section to strip international unions of their traditional power to control the minima and maxima of rates of dues without one word in the Committee Reports expressing that intention. On the contrary, we must as-

sume that Congress was aware of the established structure and practices and interpret the statute in the light thereof.

317 F.2d at 917-18 (footnotes omitted).

Unlike the dues provision at issue in *Mori*, Article X section 3(d) of the International Constitution merely establishes minimum local dues rates[32] without creating "dues differentials" among members of the international union. *Mori, supra*, 482 F.2d at 843.[33] *Cf. Steib* v. *New Orleans Clerks, supra*, 436 F.2d at 1106 (Portion of dues increase voted at district convention that was payable only to local union violates 29 U.S.C. § 411(c)(3)). Therefore, applying the principles articulated in *Local No. 2* and *Ranes*, I conclude that dues increases implemented by Local 82 in accordance with the provisions of Article X, section 3 of the International Constitution do not violate 29 U.S.C. § 411(a)(3).

Plaintiffs' second contention is that even if Article X, section 3 of the International Constitution is a lawful means for increasing union dues under the Act, Local 82 has failed to increase its dues in the manner required by Article X, section 3, and has therefore violated 29 U.S.C.

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[32] Article X, section 3(d) provides that "nothing herein contained shall be construed to prohibit any Local Union from adopting a dues scale higher than the one provided herein, either by continuance of established dues formulas or by Local Union action in accordance with applicable law."

[33] Although for the reasons stated in the text *Mori* is plainly distinguishable from this case, the court there expressly "decline[d] to follow *Ranes* [as well as *Local No. 2* and *White* v. *Local No. 207*] by interpreting [29 U.S.C. § 411(a)(3)] in a manner inconsistent with its plain meaning." 482 F.2d at 842-43. For the reasons articulated in the portion of *Ranes* quoted in the text, and because to do otherwise would render meaningless the language in 29 U.S.C. § 411(a)(3) permitting labor organizations to increase dues "by majority vote of the delegates voting at a regular convention . . ." I follow the analysis set forth in *Ranes* rather than that set forth in *Mori*.

§ 411(a)(3). The undisputed facts indicate that Local 82 failed to conform to Article X, section 3 in two respects. First, the Local increased its dues from $11 to $12 per month in October 1977, not to $13 per month as required by the International Constitution. *See* pp. 23-24, *supra*. Although the Local's failure to raise its dues sufficiently may violate the International Constitution, such a failure does not establish a valid claim under Title I for the relief requested by plaintiffs.

However, it does appear that in June and August 1979, Local 82 increased some members' dues beyond the minimum authorized by the International Constitution until October 1979, and that in November and December 1979, and January and April 1980, defendants increased some members' dues at a time other than that authorized by the International Constitution, in all instances without conducting a secret ballot as required by 29 U.S.C. § 411(a)(3)(A), in violation of 29 U.S.C. § 411(a)(3). Because the court was concerned that members of Local 82 had been guilty of laches for failing to protest the dues increase at the time it occurred, *see* part IV-B, 1, *supra*, the April 24, 1981 proposed order included the following language:

> Any member who claims that he fails to meet the eligibility requirements stated [in the preliminary injunction] only because
>
> (A) between June 1979 and October 1979, he failed to pay increases in his dues implemented in June or August 1979; OR
>
> (B) between November 1979 and October 1980, he failed to pay increases in his dues implemented in November and December 1979 and January and April 1980; must file a claim in writing with the Arbitrators together with supporting evidence, no later than 15 days before the nomination meeting. The Arbitrators shall make findings as to whether the claimant satisfies the criteria set forth in (A) or

(B), and shall compile the claims and findings into a report to be filed with the court not later than 7 days before the nominations meeting, upon which the court shall determine whether a claimant should be permitted to run for office despite his failure to protest sooner the dues increases listed above.

At the conference on April 27, 1981, both plaintiffs and defendants indicated that such language was unnecessary because no individuals met the criteria set forth in (A) or (B). Accordingly, the language was deleted from the preliminary injunction.[34]

V.

EXPLANATION OF THE COURT'S ORDER

A. The Contents of the Order

Throughout the hearings on the form of the preliminary injunction, it has been the court's intention to issue an order that interferes as little as possible with the nomination and election procedures required by the International Constitution and Local By-laws. In large part, the content of the court's order is derived from stipulations and proposals offered by the parties after January 9, 1981, when counsel for defendants first indicated that Local 82 was prepared to conduct a new nomination meeting and election. In their January 15 and 22, 1981 stipulations, *see* p. 3, *supra*, defendants proposed that the nominations and election be conducted under the supervision of Teamsters Joint Council 10. When it became clear that plaintiffs would not agree to several of the terms of defendants' stipulation, in particular to the role of Joint Council 10 in the new election, the court issued its February 12, 1981 Proposed Order Concerning The Conduct of the Election, which explicitly incorporated many of the terms

[34] Defendants have stipulated that no member will be disqualified from being a candidate in the forthcoming election for failing to pay a dues increase in any month in which the rate of dues has been changed so long as he pays the additional amount owed to the Local before the start of the nominations meeting ordered by the court.

of defendants' stipulations and provided for the filing of an undertaking by Joint Council 10 if it consented to supervise the election under the terms and conditions set forth in the court's order. However, at a hearing on February 20, 1981, defendants informed the court that Joint Council 10 was unwilling to file such an undertaking, and requested that all references to defendants' stipulations be deleted from the court's order. At that time, the court requested the parties to determine if they could agree upon a third party to supervise the election. In April 1981, plaintiffs' counsel informed the court that Lawrence Katz, Esquire, in conjunction with the Honest Ballot Association of New England (hereinafter referred to as "the Arbitrators"), would supervise the election. Defendants were given an opportunity to object to the selection of the Arbitrators and have not done so.

Following hearings on plaintiffs' dues claim, the court issued the April 21, 1981 Modified Proposed Order Concerning the Conduct of the Election, which incorporated several of the changes requested by the parties, as well as the court's rulings on plaintiffs' dues claims and defendants' request for bond. *See* part V-C, *infra*. At a conference on April 22, 1981, counsel for the parties and a representative of the Arbitrators made additional suggestions concerning the terms of the proposed order that were incorporated in a stipulation filed with the court on May 5, 1981. The preliminary injunction includes the changes agreed to by the parties.

B. Defendants' Motion for A Stay Pending Appeal

At the conclusion of the April 22, 1981 conference, counsel for defendants moved pursuant to Fed. R. Civ. P. 62(c) for a stay of preliminary injunction pending appeal. In light of the continuing and irreparable harm that plaintiffs are suffering as a result of defendants' Title I violations, *see* part III-B, *supra*, and plaintiffs' substantial likelihood of prevailing both on appeal and at trial, *id.*, I conclude that defendants' motion to suspend injunction

pending appeal should be denied, despite the posibility that defendants will suffer irreparable harm. Under the terms of the preliminary injunction, no person is required to take action for forty days after the entry of the order. Therefore, defendants will have ample time to file their notice of appeal and present a request for stay to the Court of Appeals before any action need be taken pursuant to the court's order.

C. Bond Requirement

Rule 65(c) provides:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sums as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

The determination whether to require security, and the amount thereof, rests in the sound discretion of the court. *Scherr* v. *Volpe*, 466 F.2d 1027, 1035 (7th Cir. 1972). In addition to considering the possible harm caused to the enjoined party by an unlawful order, the court may consider the likelihood that the applicant will succeed on the merits, *id.*, his ability to post a substantial bond or surety, *Olshock* v. *Village of Skokie*, 401 F. Supp. 1219, 1222 (N.D. Ill. 1975), and the possible adverse impact that requiring substantial security may have on the enforcement of rights created by remedial legislation. *National Resources Defense Council* v. *Morton*, 337 F. Supp. 167 (D.D.C. 1971), *aff'd on other grounds*, 458 F. 2d 827 (D.C. Cir. 1972) (National Environmental Policy Act); *Bass* v. *Richardson*, 338 F. Supp. 478, 491 (S.D.N.Y. 1971) (Social Security Act).

In the instant case, Local 82 seeks a bond sufficient to compensate it for the expense of conducting the nomination meeting and election ordered by the court. According to the papers filed by the arbitrators who will super-

vise the election, their expenses are likely to be approximately $2500. In addition, under the court's order, Local 82 will be required to send notices of the nomination meeting and ballots to each of its approximately 750 members. Thus, the total cost of implementing the court's order may exceed $3000. Plaintiffs do not contend that they are indigent. However, they assert that posting a bond sufficient to cover the costs of the new election would impose a severe financial hardship upon them.

Applying the factors listed above, the court concludes that plaintiffs should not be required to post a bond. When it enacted the LMRDA, Congress sought to ensure "the full and active participation by the rank and file in the affairs of the union." *American Federation of Musicians* v. *Wittstein, supra*, 379 U.S. at 182-83. *See* part III-B, *supra*. Thus, union members were given the right to seek relief in the courts when misconduct by union officials undermines union democracy. *See United Brotherhood of Carpenters of America* v. *Brown*, 343 F.2d 872, 882-83 (10th Cir. 1965). Plaintiffs have shown a strong likelihood of establishing that defendants violated their rights secured by Title I of the LMRDA. *See* part III-B, *supra*. As a result of defendants' probable violations, plaintiffs have been put to the substantial expense of securing preliminary relief, while defendants have used union funds to pay witnesses and counsel for their appearances in this action. *See Hall* v. *Cole, supra*, 412 U.S. at 13. In light of the Congressional policy favoring union democracy, *see Navarro* v. *Gannon, supra* 385 F.2d at 518, and the adverse impact that imposing a substantial bond requirement would have on the vindication of rights afforded by Title I, plaintiffs will not be required to post a bond under Rule 65(c).

Order accordingly.

/s/ Robert E. Keeton
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 81-1545

JEROME CROWLEY, ANTHONY COYNE, JOSEPH FAHEY, ROBERT LUNNIN, JAMES HAYES, GERALD OWENS, JOHN LYNCH, JOSEPH TRASK, JOSEPH MONTAGNA,and DENNIS BATES,

v. *Plaintiffs-Appellees,*

LOCAL NO. 82, FURNITURE AND PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN, AND PACKERS; BART GRIFFITHS, SECRETARY-TREASURER, LOCAL NO. 82; GEORGE HARRIS, PRESIDENT, LOCAL NO. 82; PHILLIP PIEMONTESE, CHAIRMAN OF THE ELECTION COMMITTEE OF LOCAL 82; AND JOHN DOE, JAMES DOE AND JEROME DOE, MEMBERS OF THE ELECTION COMMITTEE OF LOCAL 82,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Massachusetts

[HON. RORERT E. KEETON, *U.S. District Judge*]
(521 F. Supp. 614)

Before
COFFIN, *Chief Judge,*
CAMPBELL and BOWNES, *Circuit Judges*

Gary S. Witlen, with whom *Kathryn Noonan* was on brief, for appellants.

Kurt M. Pressman, with whom *Mark S. Stern*, *Benjamin Hiller*, and *Goldstein, Pressman and Stern* were on brief, for appellees.

Susan M. Webman, Attorney, United States Department of Labor, with whom *T. Timothy Ryan, Jr.*, Solicitor of Labor, *John F. Depenbrock*, Associate Solicitor, and *Joseph M. Woodward*, Attorney, United States Department of Labor, were on brief, for The Secretary of Labor, amicus curiae.

May 21, 1982

BOWNES, *Circuit Judge*. Local No. 82, Furniture and Piano Moving, Furniture Store Drivers, Helpers, Warehousemen, and Packers, International Brotherhood of Teamsters (the Local) and certain of its individual officers[1] appeal the order of the district court issuing a preliminary injunction against them that principally requires the Local to conduct new elections for officer positions in the Local. The injunction was sought by several members of the Local, Jerome Crowley, Anthony Coyne, Joseph Fahey, Robert Lunnin, James Hayes, Gerald Owens, John Lynch, Joseph Trask, and Joseph Montagna, who raised a number of claims regarding the Local's conduct of nominations and elections in November and December, 1980. The claims all arose under the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401-531. The primary question posed here is whether the district court had jurisdiction under Title I of the LMRDA, 29 U.S.C. §§ 411-415, to grant the injunction, or whether, as appellants contend, the plaintiffs' only recourse was to the Secretary of Labor under Title IV of the Act, 29 U.S.C. §§ 481-483. The Secretary of

[1] These officers are Bart Griffitha, Secretary-Treasurer; George Harris, President; Phillip Piemontese, Chairman of the Election Committee of the Local; and other unidentified members of the Election Committee.

Labor has intervened on the side of appellants because of his concern over this issue. Additional questions in this appeal concern the propriety of the preliminary injunction under traditional equitable doctrines and the district court's refusal to require plaintiffs to post bond. We have jurisdiction under 28 U.S.C. § 1292(a)(1).

This case concerns only one event, the meeting held by the Local on November 9, 1980, for the nomination of candidates for positions in the Local. The November 9 meeting attracted more interest than was usually shown in the Local's monthly meetings, which was due in part to the efforts of dissident members to gather support to turn the then-current Local officials out of office. Two aspects of the meeting provoked considerable controversy. First, admission to the meeting was restricted to those members who had with them a computerized receipt (the TITAN receipt) showing that their dues had been paid up to date. Several members were denied admission because they did not have TITAN receipts, and they became angry and vocal. At one point, four of the men outside the meeting, plaintiff Lunnin, Kenneth Sprague, and two others, entered the meeting to see Bart Griffiths, the secretary-treasurer of the Local, about easing the rule. Griffiths refused to alter the rule or to allow the shop stewards to check their own dues records and admit paid-up members, but he offered to hold up the meeting for an hour in order to allow members to return home to pick up their receipts. The four-man delegation refused this offer. Lunnin and Sprague, however, had their receipts and were admitted. At the hearing before the district court, both sides presented evidence concerning the regularity with which the TITAN receipt requirement was imposed at Local meetings.

The second controversy occurred when nominations were made. Before nominations began, Griffiths read aloud lists of members ineligible and eligible for candidacy, eleven on the ineligible list and sixteen on the

eligible list. Four of the plaintiffs, Crowley, Coyne, Lunnin, and Hayes, were ineligible; one, John Lynch, was on the eligible list. Eligibility was based on timely payment of dues.[2] The remainder of the approximately 750 members of the Local, including plaintiffs Fahey, Owens, Trask, Montagna, and Bates, were on neither list.[3] At this point, proceedings began to break down—several members often spoke at once—and order was never fully restored. Questions were raised concerning eligibility requirements and the lists, and, at least in the minds of some, Griffiths did not answer them adequately. Nominations were then opened. Griffiths was nominated for secretary-treasurer, and according to the plaintiffs, Lynch was as well. At the close of nominations, however, Griffiths declared himself the sole nominee for secretary-treasurer and included Lynch among the candidates for president. Protests were unavailing. Nominations for other positions went on while similar turmoil prevailed, but plaintiffs' principal objection, and the important fact for this appeal, concerns Lynch's nomination.

Plaintiffs then filed suit in federal district court, alleging ten claims, five of them charging denials of equal rights in violation of 29 U.S.C. § 411(a)(1),[4] three for

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[2] No evidence was introduced specifically on this point, but apparently a TITAN receipt did not reflect whether one's dues payments had been timely.

[3] Testimony about the status of these members was unclear. Evidence most favorable to appellants indicates that these members were probably eligible, but records about the timeliness of their payments had not yet been checked or were not readily available.

[4] 29 U.S.C. § 411(a)(1) provides as follows:

> *(a)(1) Equal rights.*—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

denials of free expression of views in violation of 29 U.S.C. § 411(a)(2),[5] one for unlawful discipline in violation of 29 U.S.C. § 411(a)(5),[6] and one for a violation of the right to nominate candidates protected under 29 U.S.C. § 481(e).[7] The complaint, seeking preliminary

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[5] 29 U.S.C. § 411(a)(2) provides as follows:

(2) Freedom of speech and assembly.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

[6] 29 U.S.C. § 411(a)(5) provides as follows:

(5) Safeguards against improper disciplinary action.—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

[7] 19 U.S.C. § 481(e) provides in relevant part as follows:

(e) In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title [29 U.S.C. § 504] and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof.

relief, was filed on December 1, 1980, after the nomination meeting but before the subsequent by-mail election had been completed.

On December 12, in order to preserve the status quo and to protect its own jurisdiction, the district court issued a temporary restraining order preventing the Local from counting the ballots, some of which had already been received. Several days of hearings on a preliminary injunction, and many more days of negotiations regarding the terms of an order followed. On July 13, 1981, the district court issued a preliminary injunction and memorandum opinion. In its memorandum, the district court concluded that plaintiffs had shown a substantial likelihood of success in demonstrating that the imposition of the TITAN receipt requirement and the refusal to allow Lynch to run for secretary-treasurer both violated their equal right to nominate and their right to express views freely, 29 U.S.C. § 411(a)(1),(2). In the meantime, the Local had dropped the charges against the member that had given rise to the unlawful discipline claim. The injunction that the district court issued set aside the earlier nomination and election and established procedures for a new nomination and election to be overseen by a third party, Lawrence Katz and the Honest Ballot Association of New England. The order also enjoined the defendants from interfering with equal rights of the Local members to participate in meetings of the Local regarding the election and to express their views freely about the election. The plaintiffs were not required to post security under Fed.R.Civ.P. 65(c). Defendants sought a stay of the order in the district court, which it denied, and in this court, which we denied, and this appeal followed.

Appellants challenge the order below on three grounds: the district court lacked remedial jurisdiction under Title I of the LMRDA to order a new election and the

procedures therefor,[8] the preliminary injunction is improper under traditional equitable principles; and the district court improperly refused to require plaintiffs to post a bond. The Secretary of Labor (the Secretary) essentially joins appellants in their first argument and adds that the district court's TRO, issued in part to preserve the district court's jurisdiction, was error. In order to determine the propriety of the preliminary in-injunction (and the absence of posted security), we must decide whether the district court had jurisdiction to order a new election at all. This issue involves reconciliation of Titles I and IV, particularly of their respective jurisdictional provisions, 29 U.S.C. §§ 412(a), 483, which are in apparent conflict.

I. Remedial Jurisdiction

The jurisdictional argument posed by appellants and the Secretary rests on the proposition that the district court erroneously reconciled the conflict between Titles I and IV of the LMRDA. Summary of these Titles explains the conflict. Title IV sets out in some detail a number of requirements union elections must fulfill. 29 U.S.C. § 481. Included are such matters as frequency of elections, rights of candidates involving distribution of campaign material and opportunity to reach union members, reasonable opportunity for union members to nominate and elect candidates, use of union dues, and removal of union officers. *Id.* As to actual nomination and election procedures, Title IV seeks to give members in good standing an opportunity to participate but leaves

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[8] Appellants' main brief suggests that the district court did not have jurisdiction even to hear the Title I claims, although their reply brief disclaims this argument. In any event, discussion of this point is included in the discussion of the district court's remedial jurisdiction.

procedural details largely up to union constitutions and bylaws. *Id.* To enforce his Title IV rights, a union member must first exhaust his internal union remedies and then may request the Secretary to investigate and enforce his rights. 29 U.S.C. § 482(a),(b). The Secretary may sue for a court-ordered new election, 29 U.S.C. § 482(c), but the union member has a very limited right to judicial review of the Secretary's decision not to sue, *Dunlop* v. *Bachowski*, 421 U.S. 560, 572-73 (1975) (review standard is arbitrary and capricious). Title IV further provides that

> [e]xisting rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this subchapter. The remedy provided by this subchapter for challenging an election already conducted shall be exclusive.

29 U.S.C. § 483. It is on the apparent exclusivity of the Title IV remedy that appellants and the Secretary rely.

Title I is the so-called "bill of rights" for union members and provides broader rights than Title IV, including equal rights to participate in the nominating and electoral process, the rights to express views freely and to assemble with other union members, a referendum requirement for dues increases, prohibition of union-imposed limitations on a member's right to sue, and protection against improper disciplinary action. 29 U.S.C. § 411(a). Enforcement of these rights is as follows:

> Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate.

29 U.S.C. § 412.[9] In the instant case, plaintiffs sued under this provision, and the district court took jurisdiction thereunder.[10] The question is whether Title IV, particularly § 483, preempts Title I—at least to the extent that the district court may not order a new election—where ballots for a union election have been sent out, some have been returned, and none have been counted. Section 483 provides that the process established in Title IV "for challenging and election already conducted shall be exclusive."

Although it would appear that the answer to this question lies in deciding only whether the election here has already been conducted, the Supreme Court has advised against a literal reading of legislation.

> We have cautioned against a literal reading of congressional labor legislation; such legislation is often the product of conflict and compromise between strongly held and opposed views, and its proper construction frequently requires consideration of its wording against the background of its legislative history and in light of the general objectives Congress sought to achieve. See, *e.g.*, *National Woodwork Mfrs. Assn.* v. *NLRB*, 386 U.S. 612, 619. The LMRDA is no exception.

Wirtz v. *Local 153, Glass Bottle Blowers Ass'n, AFL-CIO*, 389 U.S. 463, 468 (1968) (footnote omitted).

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[9] The Title I enforcement procedure also requires that union members exhaust internal union remedies over a four-month period before bringing suit, 29 U.S.C. § 411(a)(4). Appellants and the Secretary do not challenge the district court's finding that plaintiffs' filing of a complaint with Teamsters Joint Council 10, Local 82's supervisory body, and the Council's denial of the complaint constituted sufficient exhaustion.

[10] The district court found, however, that it lacked jurisdiction over plaintiffs' Title IV right-to-nominate claim and over a claim alleging that substantially the same facts violated Title I.

The precise scope of Title IV's exclusivity in relation to Title I is obscured by the earlier reference in § 483 to "existing rights and remedies." It can be argued that § 483 does not impinge upon Title I at all because Title I is not an existing right or remedy within the meaning of § 483. This argument, which we do not adopt but merely posit, can be derived from a reading of the legislative history: Congress contemplated only that state law rights and remedies would be preempted by Title IV when it was considering the enactment of § 483. *See infra* at 18-19. We therefore deem it appropriate to analyze the tension between Titles I and IV before deciding whether the election in this case was "already conducted" for purposes of § 483. It is also necessary to determine whether plaintiffs alleged genuine Title I or Title IV claims. We address first the relationship between Titles I and IV, and before turning to the legislative history, we look to the case law for guidance.

Appellants rely heavily on *Calhoon* v. *Harvey*, 379 U.S. 134 (1964), in contending that the district court lacked jurisdiction to order a new election, and indeed that case is widely considered the starting point for examining the tension between Titles I and IV. *Calhoon* involved a pre-election attack on certain provisions of a union's bylaws and national constitution that prevented a union member from nominating anyone but himself for union office and that restricted nominating rights to union members of five or more years standing who had served a specified amount of sea time in recent years. Plaintiffs in *Calhoon* claimed that these rules deprived them of their equal right to nominate candidates under 29 U.S.C. § 411(a)(1). District court jurisdiction was therefore argued to be available under 29 U.S.C. § 412. The Supreme Court rejected this argument, stating that a court did not have jurisdiction under § 412 where any of the claims charged in substance a breach of Title IV rather than Title I rights. *Calhoon* v. *Harvey*, 379 U.S. at 138. Title IV, the Court said, set the standards for eligibility and qualifica-

tions of candidates and officials. *Id.* Section 411(a)(1) of Title I, on the other hand, only provided that union members not be discriminated against in their right to nominate and vote, and even this protection was subject to reasonable rules and regulations of the union. *Id.* at 139. The *Calhoon* plaintiffs challenged eligibility rules themselves, not any discriminatory application of them, and so actually alleged Title IV claims. *Id.* The limitation on their ability to pursue essentially Title IV claims was so, the Court went on, because Congress intended the more technically competent Secretary of Labor to handle union election issues and sought to allow unions great latitude in resolving their own disputes. *Id.* at 140. Justice Stewart concurred, observing that he would allow a district court to take jurisdiction of Title IV claims where it was asserted that union rules "effectively distorted the basic democratic process." *Id.* at 147 (Stewart, J., concurring).

In subsequent LMRDA decisions, the Supreme Court discussed at greater length the nature of Title IV. In *Wirtz* v. *Local 153, Glass Bottle Blowers Ass'n, AFL-CIO*, 389 U.S. 463, the Court observed that Title IV's "special function . . . is to insure 'free and democratic' elections," *id.* at 470 (footnote omitted). The content of Title IV, the Court continued, reflected the resolution of a vigorous debate in Congress over the competing policies of correcting abuses in union elections and avoiding "unnecessary governmental intrusion into internal union affairs." *Id.* at 470-71. Thus, under Title IV, unions enjoyed great latitude to settle internal disputes, but when they could not do so, the most skilled government agency, the Labor Department, would step in. *Id.* at 471 (citing *Calhoon* v. *Harvey*, 379 U.S. at 140). This enforcement scheme, the Court observed elsewhere, is intended to conform to "the longstanding congressional policy against unnecessary governmental interference with internal union affairs." *Hodgson* v. *Local 6799, United Steelworkers*, 403 U.S.

333, 338 (1971). In *Trbovich* v. *UMW*, 404 U.S. 528 (1972), a decision that permitted a union member to intervene in a Title IV action brought by the Secretary, the Court noted that § 483 provided "the 'exclusive' post-election remedy for a violation of Title IV," *id.* at 531. The reasons for Title IV's exclusivity in these cases were "(1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections, and (2) to centralize in a single proceeding such litigation as might be warranted with respect to a single election." *Id.* at 532. Further reference to the exclusivity of Title IV in a post-election case came in a decision allowing a union member to seek judicial review of the Secretary's decision not to sue after receiving a Title IV complaint, *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975). The Court stated that

> [c]ertain LMRDA provisions concerning pre-election conduct, 29 U.S.C. §§ 411-413 and 481(c), are enforceable in suits brought by individual union members. Provisions concerning the conduct of the election itself, however, may be enforced only according to the post-election procedures specified in 29 U.S.C. § 482. Section 483 is thus not a prohibition against judicial review but simply underscores the exclusivity of the § 482 procedures in post-election cases.

Id. at 566-67. The effect of these discussions, none of which are part of the *ratio decidendi* of the cases, is not entirely clear. The impact of Title IV's exclusive remedy on a Title I claim arising in an election is nowhere discussed. Moreover, while the Court speaks of Title IV's exclusivity, *Trbovich* and *Bachowski* "plainly evince greater solicitude for aggrieved union members, and invite greater harassment of offending unions; in so doing, they undercut *Calhoon*'s policy of non-interference." *Buna* v. *Moving Picture Machine Operators Local 224*, 567 F.2d 1117, 1124 (D.C. Cir. 1977) (Wilkey, J.) (footnote omitted).

Courts of appeals have in a few cases addressed the question of a Title I violation occurring during a union election, primarily in cases involving a denial of equal rights. Jurisdiction of a Title I claim in a union election has been upheld on the theory that prompt, effective relief for violations of Title I rights—particularly for discrimination during an election—requires that a court be allowed to take jurisdiction without forcing an aggrieved union member's claim to undergo review by the Secretary. *Kupau* v. *Yamamoto*, 622 F.2d 449, 455 (9th Cir. 1980). In addition, the exclusivity clause of § 483 does not clearly preclude jurisdiction of Title I claims, and when the Supreme Court speaks of the exclusivity of the Title IV remedy, it is careful to speak of its exclusivity only as to Title IV rights. *Id.* (citing *Calhoon* v. *Harvey*, 379 U.S. at 140). Elsewhere, the question has been phrased only in terms of a cause of action:

> [T]he crucial question for the court is whether or not a union member has been discriminated against in one of the rights enumerated in [§ 411(a)(1)]. If such discrimination is present, a cause of action exists under [§ 411(a)(1)] regardless of other claims; absent such discrimination, the courts have no such jurisdiction.

Depew v. *Edmiston*, 386 F.2d 710, 712 (3d Cir. 1967) (footnote omitted). Similar reasoning appeared in *McNail* v. *Amalgamated Meat Cutters, AFL-CIO*, 549 F.2d 538, 540 (8th Cir. 1977). With respect to free speech rights, "[w]hen rights of free speech and of association—as opposed to the rights of voting and election—of union members are invaded by the actions of union officers, the requirement of initial appeal to the Secretary under Title IV is inapplicable," *Schonfeld* v. *Penza*, 477 F.2d 899, 903 (2d Cir. 1973), and jurisdiction under Title I is available.

Our review of the legislative history persuades us that these decisions correctly refused to find Title I election

claims and remedies preempted by Title IV. What was to become the LMRDA was reported out of the Senate Committee on Labor and Public Welfare as S. 1555. This Senate bill contained no provisions comparable to the current Title I provisions, but it did have provisions regarding union elections that were substantially similar to those now contained in Title IV. In particular, the rules regarding elections were to be enforced by the Secretary of Labor on complaint from union members. S. 1555, § 302; S. Rep. No. 187, 86th Cong., 1st Sess., *reprinted in* [1959] U.S. Code Cong. & Ad. News, 2318, 2337-38, 2364-65.[11] Union members retained existing rights and remedies to enforce union election rules before an election was conducted, but complaint to the Secretary was the only avenue open for challenging an election already held. S. 1555, § 303; S. Rep. No. 187 at 2338, 2365. The existing rights and remedies at this time all derived from state law and union constitutions and bylaws. The result of these provisions was that all pre-election relief was at state law, and post-election relief was exclusively a matter of federal law. S. Rep. No. 187, Minority Views, Appendix B, at 2408.

Dissenting members of the Senate Committee and others objected to the lack of a "bill of rights" for union members as against the union in S. 1555, S. Rep. No. 187, Minority Views at 2374-75 (Senators Goldwater and Dirksen), and appropriate amendments were offered to the Senate bill by Senators McClellan and Kuchel, 105 Cong. Rec. 6475-76 (1959) (McClellan amendment); *id.* at 6693-94 (Kuchel amendment). The McClellan amendment, introduced first, established several rights for union members, including equal rights and free speech, and empowered the Secretary to seek injunctions and other relief to enforce those rights. The principal objection to this amendment came from many of the proponents of S. 1555,

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[11] Hereinafter cited as S. Rep. No. 187 with page citations to [1959] U.S. Code Cong. & Ad. News.

who were concerned that these statutory rights would preempt state and federal rights union members already enjoyed, *see* 105 Cong. Rec. 6481-87 (1959) (remarks of Sen. Kennedy),[12] and would operate to hamstring legitimate union activities, *see* 105 Cong. Rec. 6721 (1959) (remarks of Sen. Church). Some opposition was also voiced to the provision for enforcement by the Secretary on the grounds that the availability of injunctive relief would deny defendants a trial by jury in suits brought by the government and that it would set an undesirable precedent for federal enforcement of racial integration and civil rights.

The McClellan amendment was passed by a one-vote margin, but three days later it was replaced by the Kuchel amendment, which contained a bill of rights responsive to the concerns aired about the McClellan amendment. The Kuchel amendment redefined and narrowed union members' rights slightly in order to give unions more leeway to conduct their affairs reasonably. The Kuchel amendment also included a clause declaring that the "bill of rights" did not limit any other rights and remedies union members possessed. 105 Cong. Rec. 6694 (1959) (§ 103). The McClellan amendment had been similarly modified earlier. 105 Cong. Rec. 6487 (1959). One of the major

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[12] Senator Kennedy was one of the sponsors of S. 1555 and its floor manager in the Senate. Among his remarks were the following:

> I think the amendment raises the question of preemption. In other words, if the proposal were enacted, the present rather exhaustive remedies provided under the common law of the various States might be wiped out, and only the rights suggested by [Senator McClellan] would then be available to union members.

105 Cong. Rec. 6482 (1959).

> [I]n order to prevent [the McClellan] amendment from preempting the field, certainly additional language would be required either in the bill or in the amendment of [Senator McClellan].

Id.

changes effected by the Kuchel amendment was to provide for enforcement by individual union members, not by the Secretary, as follows:

> Sec. 102. Any person whose rights secured by the provisions of this title have been infringed may bring an action in a district court of the United States for such relief as may be appropriate.

105 Cong. Rec. 6694 (1959). According to Senator Kuchel, this change was in the "interest of justice." 105 Cong. Rec. 6720 (1959). Senator Kefauver's explanation of his preference for the Kuchel amendment over the McClellan amendment is perhaps more illuminating:

> I wish to congratulate the sponsors of the [Kuchel] amendment on the amendment they have presented, leaving out section 103 [of the McClellan amendment], which, as has been stated, would put the Secretary of Labor in the middle of the actions of every labor union in the United States and give him the right to institute suits at his will. It would be very difficult to carry on management-labor relations in the public interest if an unthoughtful Secretary of Labor wished to interfere. This section, plus the absence of a requirement for jury trials, were the principal reasons I voted against the McClellan amendment.

105 Cong. Rec. 6726 (1959).

After passage, S. 1555 went to the House, where the Committee on Education and Labor reported out a modified version of the bill. In addition, two other bills, the Landrum-Griffin bill and the Shelley bill, were presented to the House. All three bills contained roughly similar "bill of rights" and election procedure provisions.[13] As to elections, all three bills allowed aggrieved union members themselves to bring suit in federal district court (after

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[13] The principal differences between the bills concerned matters not at issue here, such as secondary boycotts and hot cargo practices.

exhausting internal remedies for a certain period) for appropriate relief for violations of election (Title IV) rights, including a new election supervised by the Secretary of Labor. H.R. 8342, § 402; H. Rep. No. 741, 86th Cong., 1st Sess., *reprinted in* [1959] U.S. Code Cong. & Ad. News 2439, 2465-66;[14] 105 Cong. Rec. 15707 (1959) (Landrum-Griffin bill); *id.* at 15716 (Shelley bill). This process was, in all three bills, the exclusive means by which union members could attack improperly held elections, but members retained rights at state law to challenge pre-election violations. H.R. 8342, § 403; H. Rep. No. 741 at 2439-40, 2466; 105 Cong. Rec. 15707 (1959) (Landrum-Griffin bill); *id.* at 15716 (Shelley bill). Indeed, the language of exclusiveness in all three bills was identical to that contained in S. 1555 and now in 29 U.S.C. § 483. The apparent purpose of the exclusivity clause was the same as in the Senate: to preempt state remedies after a union election had occurred but otherwise to save them. *See* 105 Cong. Rec. 15689 (1959) (remarks of Cong. Brademas) (one of major provisions of committee bill is to preserve "members' rights to enforce [a] union's constitution under State laws with respect to trusteeships and safeguarding fair procedures before an election."). With respect to enforcement procedures, the only explanation for the House's preference for enforcement of election rights by individual members rather than by the Secretary was given by Congressman Teller.

> [A] sharp departure of our committee bill from S. 1555 has to do with the extent to which the obligations of the proposed law are given over to the Secretary of Labor for enforcement. S. 1555 goes overboard on this; the Secretary of Labor is given enormous powers of rulemaking and enforcement. Estimates of the annual cost of administering S. 1555 have varied from $25 million to anywhere up to $100

[14] Hereinafter cited as H. Rep. No. 741 with page citations to [1959] U.S. Code Cong. & Ad. News.

> million. Our committee bill H.R. 8324 substitutes the courts for the Secretary in most instances, and provides remedies which aggrieved individuals may enforce without the Secretary's permission. This will save the taxpayer millions of dollars annually, and accords with our traditions without reducing the effectiveness of the enforcement procedure.

105 Cong. Rec. 15681-82 (1959) (remarks of Cong. Teller). Violations of "bill of rights" protections were to be similarly remedied under all three bills: after exhausting internal union remedies over a certain period, aggrieved members could bring suit in federal district court for appropriate relief. H.R. 8342, § 402 (committee bill); 105 Cong. Rec. 15704 (1959) (Landrum-Griffin bill); 105 Cong. Rec. 15713 (1959) (Shelley bill).

The House passed the Landrum-Griffin bill, and it, together with the Senate bill, went to conference. With respect to the "bill of rights," the conference committee retained the House provisions, including enforcement by individual union members. Conf. Rep. No. 1147, *reprinted in* [1959] U.S. Code Cong. & Ad. News 2503, 2503-04. The committee followed, however, the Senate provisions covering complaints of violations of election rules; only the Secretary was authorized to sue to set aside an improperly held election. Conf. Rep. No. 1147, *reprinted in* [1959] U.S. Code Cong. & Ad. News 2503, 2507. As both Senate and House bills had suggested, this remedy for an improperly held election, once conducted, was exclusive. S. 1555, § 403; H.R. 8342, § 403 (as amended by Landrum-Griffin bill).

This history suggests that Congress intended the Secretary to have considerable responsibility for examining union elections, but it does not suggest that Congress sought to oust the federal courts of jurisdiction over complaints involving union elections. The exclusiveness of the Title IV remedy in certain cases was intended to exist only vis-a-vis state remedies; there is no evidence that limita-

tions on Title I by Title IV were ever contemplated. Moreover, while Congress recognized that authorization of the Secretary to enforce Title IV would serve the functions of screening out nonmeritorious claims and avoiding a plethora of suits challenging the same election, *see Trbovich* v. *UMW*, 404 U.S. at 532—policies that appellants and the Secretary emphasize in the instant appeal—this same reasoning might have been applied to Title I but was not. Indeed, Senators opposing authorization of the Secretary to enforce Title I suggested that it would create undue interference in labor-management relations, which would thwart achievement of broader goals of improving such relations. The apparent feeling in the House was that enforcement by the Secretary would be too expensive, as well as too intrusive.

We conclude that the different purposes that Congress sought to have Titles I and IV serve do not require, absent a specific statutory provision, that a federal district court be foreclosed from taking jurisdiction of a Title I claim in an election case such as this one, where ballots have been sent out, some have been received, and none have been counted. This result respects the special competencies of both the courts and the Secretary. The rights protected by Title I, particularly equal rights to participate in union elections, free speech, and due process, 29 U.S.C. § 411(a)(1), (2), (5), are in the nature of rights traditionally protected by federal courts. Title I rights are not rights as to which the Secretary has particular expertise, so it is unnecessary for him to perform a screening function. Furthermore, these rights are individual—as opposed to the "group" right of members to an election conducted in accordance with the union constitution and bylaws and 29 U.S.C. § 481(e)—so enforcement of such rights by individual members in the courts will not substantially undermine the consolidation function performed by the Secretary in a Title IV case. That is, suits involving Title I rights will produce individual fact patterns, and, even if several suits are brought, conflicting or redundant rulings

are not likely to emerge, and unions will not be burdened unfairly by litigation.

While we conclude that pursuit of Title IV's goals do not preempt Title I in the instant case, two questions remain. First, were the plaintiffs' claims genuine Title I claims or only Title IV claims to which the Title I label was affixed? Second, was the election in this case "already conducted" for purposes of § 483 with the result that it was outside the district court's jurisdiction even though other Title I election cases would not be?

The first question is important because by fashioning rules to distinguish Title I and Title IV causes of action, federal courts have developed a pragmatic method for, in many instances, reconciling the two titles and allowing them to operate in their separate spheres. Concern with the sufficiency of a Title I claim began in *Calhoon* v. *Harvey*, 379 U.S. 134, where the mere labelling of claims as Title I claims was held insufficient, *id.* at 138. With respect to a violation of equal rights under Title I, 29 U.S.C. § 411(a)(1), the touchstone of a valid Title I cause of action is discriminatory application of eligibility rules, *id.* at 139; *Kupau* v. *Yamamoto*, 622 F.2d at 453-54; *McNail* v. *Amalgamated Meat Cutters, AFL-CIO*, 549 F.2d at 540; *Depew* v. *Edmiston*, 386 F.2d at 714. In this case, appellees alleged several violations of equal rights protected by Title I, but the district court found that only two violations were likely to have been committed: the exclusion of members from the nomination meeting for failure to show TITAN receipts and the refusal to include Lynch as a candidate for secretary-treasurer. The facts alleged in the complaint show that appellees objected to applications of union rules against particular members; appellees did not object to the rules themselves. We accordingly hold that the allegations of these probable violations presented sufficient equal-rights causes of action, and we defer consideration of the evidentiary basis of the district court's findings until we review the preliminary injunction.

A similar cause-of-action analysis is applied to complaints charging violations of free speech rights protected by Title I, 29 U.S.C. § 411(a)(2). The distinction between attacks on rules themselves and attacks on discriminatory application of them that is used to analyze purported § 411(a)(1) claims does not, however, have a convenient parallel in a distinction between challenges to eligibility rules and challenges to applications of those rules that impede free speech. The rule that has been developed as to § 411(a)(2) claims is that where an election or election rules are involved, a court will have jurisdiction only "where union action abridging both Title I and Title IV can be fairly said, as a result of established union history or articulated policy, to be part of a purposeful and deliberate attempt by union officials to suppress dissent within the union." *Schonfeld* v. *Penza*, 477 F.2d 899, 904 (2d Cir. 1973). *Accord*, *Driscoll* v. *Operating Engineers, Local 139*, 484 F.2d 682, 686-88 (7th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974). This rule represents an attempt to reconcile the Title IV policy that the Secretary first investigate election disputes with the Title I policy that federal courts protect the democratic spirit in union elections and elsewhere. *Schonfeld* v. *Penza*, 477 F.2d at 903-04.

Examining the allegations that underlie the free speech violations found by the district court, we conclude that plaintiffs sufficiently alleged that the application of the TITAN receipt requirement and the failure to include Lynch on the proper candidate list represented deliberate and purposeful attempts to suppress dissent. It was and is still up to plaintiffs, of course, to prove their allegations, as a matter we discuss below.

The second question, whether the election was "already conducted," is raised in the Secretary's brief in the challenge to the district court's TRO, which was issued to prevent the counting of ballots and thus to prevent the election from becoming "already conducted." According to the Secretary, it was already too late; the district court

had already lost its jurisdiction. An election cannot be said to begin until ballots are distributed, nor can it be completed until the results are announced, but § 483 does not make clear how the period between ballot distribution and announcement of results should be classified. The instant case involves this uncertain period: ballots for the by-mail election had been sent out, some had been returned, and none had been counted.

The Secretary argues that the balloting process is part of the conduct of an election and that therefore other rights and remedies are available only before ballots are sent out. The Secretary points out that this result conforms to other provisions of Title IV, which empower the Secretary to supervise elections, and that it avoids a "race to the courthouse" that would occur if losing candidates could seek judicial relief after they learn of the results but before the results are officially announced. (Appellants address this point in a footnote, contending simply that the election in the instant case was "already conducted.") Appellees argue that an election is not "already conducted" until ballots are counted, or at least that an election is not "already conducted" when, in a case such as this one, ballots have been sent out, some have been returned, and none have been counted.[15]

The legislative history on this point is unclear. S. 1555, which did not contain an exclusivity clause in its equivalent to Title IV, nevertheless apparently contemplated such a provision, but the explanation of the exclusiveness of the remedy at the time the Senate debated S. 1555 did not fix precisely the point when the federal remedy became exclusive. Senator Kennedy offered the explanation that

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[15] Resolution of these arguments involves a secondary question: in deciding whether an election has occurred, should the court look at the time of the alleged violation or at the point in the electoral process where a remedy would be ordered? For purposes of this discussion only we will adopt the Secretary's position on this matter, that the time of the remedy is crucial.

"[p]rior to the day of an election an individual can sue a State. The day after an election the Secretary of Labor assumes jurisdiction." 105 Cong. Rec. 6485 (1959). What is meant to happen the day of an election, essentially the problem here, is unsaid. *See also* S. Rep. No. 187 at 2338; H. Rep. No. 741 at 2440. Moreover, at the time Senator Kennedy spoke, the bill did not contain a "bill of rights," and one cannot tell what effect, if any, the "bill of rights" would have been thought to have on this aspect of the future Title IV. The legislative history bearing generally on Titles I and IV, discussed above, supplies some greater assistance. Both houses of Congress displayed extensive support for individual rights protections that were written into Title I. Enforcement of these rights by the Secretary was rejected, some concern being voiced about the intrusiveness of that manner of enforcement. "Already conducted" should not be interpreted, therefore, so as to render Title I subordinate to Title IV.

The cases are not in accord, but the most extended treatment of the issue by one court appears in three opinions by the Third Circuit Court of Appeals. In one, the case to which the Secretary and appellants direct us principally, the court laid down the rule that "an election has been conducted once balloting has occurred." *McDonough* v. *Local 825, Int'l Union of Operating Engineers*, 470 F.2d at 264. In that case, ballots had been returned and counted, the results were known, and the only thing left to be done was to certify the results. *Id. McDonough* thus does not provide a very reliable interpretation of "already conducted," a point borne out by its failure to discuss the earlier opinion in *Depew* v. *Edmiston*, 386 F.2d at 712, which allowed a Title I challenge to an election in which ballots had already been sent out. *Depew*, however, did not address the relationship of the mailing to § 483. The ambiguity of these rulings appears to have been resolved in the third case, *Amalgamated Clothing Workers Rank & File Comm.* v. *Amalgamated Clothing Workers, Philadelphia, Joint Board*, 473 F.2d 1303 (3d

Cir. 1973), which stated that "*once the election has been completed*, the outcome cannot be affected by [a] Title I suit." *Id.* at 1306 (emphasis added). It cited *McDonough* in support of this proposition.[16] Other courts have also concluded that an election is not "already conducted" until it is completed, that is, until the ballots are counted and the results are known. *See Beckman* v. *Local No. 46, Int'l Ass'n of Bridge Workers*, 314 F.2d 848, 850 (7th Cir. 1963) (approving district court's ruling that Title I would be defeated if plaintiff in ballot-tampering case had to wait until ballots were counted and then pursue remedy under Title IV; no specific discussion of § 483); *Kolmonen* v. *International Hod Carriers Union*, 215 F. Supp. 703, 709 (W.D. Mich. 1963) (Title I remedy available if challenge occurs "before a completed election"); *cf. Kupau* v. *Yamamoto*, 622 F.2d at 455-57 (Title I remedy available even after completed election if Title I claim does not ripen until that time).

Contrary statements, apart from the apparently superseded *McDonough* opinion, come from the district courts.[17]

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[16] The position of the Second Circuit is difficult to assess. Initially, it suggested a similar rule—plaintiff complaining about election practices "subsequent to the nomination and voting" must look to Title IV for relief, *Libutti* v. *DiBrizzi*, 337 F.2d 216, 218 (2d Cir. 1964)—but its vitality may be suspect, *see Libutti* v. *Dibrizzi*, 343 F.2d 460, 461 (2d Cir. 1965), *aff'g on rehearing Libutti* v. *DiBrizzi*, 337 F.2d 216 (*Calhoon* "casts considerable doubt" on interpretation of Title I in earlier opinion). The district courts have moved further away from this rule. *See New Action Coalition* v. *Local 2, United Federation of Teachers*, 510 F. Supp. 1208, 1211-12 (S.D.N.Y. 1981) (election "already conducted" once ballots mailed out); *Laski* v. *International Organization of Masters*, 502 F. Supp. 134, 135-36 (S.D.N.Y. 1980) (same).

[17] Courts of appeals have dismissed Title I claims because elections have already occurred, but in these cases the results of the election have been known, and the election has been over. *Davis* v. *Turner*, 395 F.2d 671, 672 (9th Cir. 1969); *cf. Kemptherne* v. *United Transp. Union*, 457 F.2d 551, 553 (7th Cir. 1972) (per curiam) (completed election mooted claim).

In *Laski* v. *International Organization of Masters*, 502 F. Supp. 134, 135-36 (S.D.N.Y. 1980), the district court held that the mailing of ballots rendered the election "already conducted." The court relied on *McDonough* and the policy behind Title IV that federal courts not disrupt union elections. *Id.* (The district court also ruled alternatively that no Title I claim had been stated). The same rule was announced by a different judge of the same court, this time in reliance entirely on *McDonough*. *New Action Coalition* v. *Local 2, United Federation of Teachers*, 510 F. Supp. 1208, 1211-12 (S.D.N.Y. 1981); *see also Lawrence* v. *Utility Workers Local 126*, 509 F. Supp. 1151, 1158 (N.D. Ohio 1981 (dictum) (quoting *McDonough*).

The phrase "already conducted" is, as the foregoing shows, not free from ambiguity, but it seems to make most sense as "previously carried out." Considering the stages of an election—the last being the tabulation of votes—it is hard to conceive of an election as "already conducted" before the final stage has been completed; union members—the class of potential Title I plaintiffs—would not think that an election was "already conducted" when they had received their ballots but not yet voted.

In addition to the language of § 483, the policies behind Titles I and IV favor a construction of "already conducted" that an election has not reached that point until the ballots have been counted. First, the need for effective relief requires that Title I remedies be available for violations that occur during the election process. Relief for violations under Title IV is possible only if the wrong "may have affected the outcome of an election," 29 U.S.C. § 482(c)(2); *see* 29 C.F.R. § 452.5. This test is mathematical: the Secretary of Labor will litigate under Title IV only if the number of affected ballots would have changed the outcome of the election. Comment, Union Elections and the LMRDA: Thirteen Years of Use and Abuse, 81 Yale L.J. 407, 498-99 (1972). The result is obvious: flagrant violations may go unremedied if the number of

affected ballots is too small. For example, foreclosure of Title I claims once balloting begins would prevent effective relief for violations that occur during the election, such as denial of access to the polling place or failure to provide a minority with ballots, Note, Election Remedies Under the Labor-Management Reporting and Disclosure Act, 78 Harv. L. Rev. 1617, 1628 (1965). Moreover, some violations are not susceptible to this mathematical test, and there appears to be little guidance for the Secretary in determining whether to sue in these instances. Comment, *supra*, 81 Yale L.J. at 499.

Second, evaluation of the impact Title I may have on Title IV's policy of noninterference in union elections suggests that "already conducted" means that the ballots have been counted. Preresult judicial relief need not require a new election in all cases: the remedy necessary for discrimination against a few voters may be simply the opportunity for those voters to vote anew. Such a remedy is more flexible and potentially less disruptive than a new election, the only remedy that is possible under Title IV. Preresult judicial relief possesses other advantages over Title IV, all of which minimize the harmful effect government intervention may have on union affairs. Resolution of a dispute before the results of the election are known will prevent the dispute from casting doubt on the election. It will also prevent illegitimate victors from consolidating their positions and will help provide a fair and honest election in the first instance. Note, *supra*, 78 Harv. L. Rev. at 1623-24. Preresult Title I suits admittedly can be used to harass unions and to delay elections,[18] *see id.* at 1624, but the capacity of these suits to vindicate individual rights far outweighs these disadvantages, which

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[18] One other argument against these suits, that an aggrieved party may win thereby mooting his claim, is not applicable in a case such as this, where one plaintiff is denied the right to be listed in the correct group of candidates.

may be protected against by the court in the same way that it handles other frivolous claims.

Finally, "already conducted" should mean "already completed" because one of the strongest reasons against Title I suits by individual union members does not come into being until the ballots have been counted. This reason is that union members should not be allowed to sandbag elections, that is, they should not wait to see whether they won or lost an arguably improperly held election before bringing suit. This is the "race to the courthouse" about which the Secretary is concerned. Up until the time ballots are opened and counted, there can be no sandbagging.

We rule, therefore, that an election is not "already conducted" until all the ballots are counted and find that the election in this case was not "already conducted." [19] We are cognizant of the Secretary's arguments that foreclosure of Title I suits at an earlier point will better enable the Secretary to centralize and screen suits, will exploit the Secretary's expertise, and will further union self-government. We believe that these arguments have largely been answered above, but we emphasize two points in addition. First, these policies are to be considered in view of the entire scope of Title IV, which reaches several areas not addressed in Title I, and these policies are consequently not much affected whether Title I suits are allowed before or after ballots are mailed. Second, whatever the effects may be, we are persuaded that the legislative history of Title I shows that Congress intended full enforcement of Title I rights, and that the importance of these rights overrides the effects that the suits we permit here will have on Title IV.

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[19] This holding makes it unnecessary to consider whether the Ninth Circuit's ruling in *Kupau* v. *Yamamoto*, 622 F.2d 449, 456 (9th Cir. 1980), that a court may have jurisdiction to order a new election even after the first election is already completed—if the Title I claim also accrues after that time—is also the law here.

II. *The Preliminary Injunction*

In addition to their jurisdictional attack, appellants also challenge the propriety of the preliminary injunction issued by the district court. On appeal of a preliminary injunction, the district court will be upheld unless it abused its discretion or applied improper legal or equitable standards. *Planned Parenthood League* v. *Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981). The district court itself must make four findings in order to issue a preliminary injunction: the plaintiff will be likely to succeed on the merits of his claim, he will suffer irreparable harm if the injunction is not granted, issuance of the injunction will not cause more harm to the defendant than failure to issue would cause the plaintiff, and the public interest favors the injunction. *Id.* Appellants make essentially five arguments in contesting the findings made by the district court. First, the district court improperly found that plaintiffs were likely to succeed on the merits of two of their claims. Second, the injunction violated the traditional rule of equity that preliminary injunctions exist only to preserve the status quo. Third, the preliminary injunction granted effectively all the relief sought by plaintiffs, something a preliminary injunction should not do. Fourth, the terms of the injunction—prescribing in detail new nomination and election procedures—go well beyond remedying the probable violations found by the district court—defects in only the nominating process—and preventing harm to plaintiffs. Finally, the "stipulations" proposed by appellants for a new election—the apparent reason the injunction covered the election as well as the nomination process—did not justify the district court in so enlarging the injunction. With respect to appellants' final four arguments, we note that appellants appear to argue mainly that *any* injunction requiring a new nomination meeting and election would be invalid; as appears in the discussion below, some of the specific terms of the injunction are not offensive to appellants. We nevertheless do discuss some of the specific terms as well.

As to the evidence underlying the district court's conclusion that plaintiffs enjoyed a likelihood of success on two claims, we will affirm the findings unless the district court committed clear error. Fed.R.Civ.P. 52(a). The two factual events in which the district court found probable Title I violations were the exclusion of members from the nomination meeting for failure to show TITAN receipts and the refusal to include Lynch as a candidate for secretary-treasurer. Each event was said to violate both the equal rights and free speech provisions of Title I. Review of the record convinces us that these events were properly found likely to be incidents of discrimination and repression directed against certain dissident members in violation of Title I, not application of unreasonable rules to members generally in violation of Title IV. Plaintiffs introduced evidence showing that they represented an identifiable group of dissidents, that the TITAN receipt rule had not been implemented until the nomination meeting when dissident members were expected to appear, and that Lynch's nomination was incorrectly recorded as one for president, the only possible explanation for which was discrimination on the part of the incumbent, the only other candidate for secretary-treasurer. This evidence was sufficient to enable the district court to find that equal rights had probably been denied and that a purposeful attempt had probably been made to suppress dissent.

Admittedly, with respect to Lynch's nomination, Lynch himself testified that he was nominated for president. Appellants argue that this testimony and the "adverse inference" rule, *International Union, UAW* v. *NLRB*, 459 F.2d 1329, 1335-39 (D.C. Cir. 1972) (litigant's failure to produce relevant evidence within its control warrants inference that evidence is adverse to litigant), required the conclusion that Lynch's nomination was correctly recorded as one for president. We disagree. Other witnesses testified that Lynch was nominated for secretary-treasurer, and since all these witnesses were present at

the nomination meeting, the district court did not err in crediting their testimony over Lynch's. Nor was Lynch's testimony evidence exclusively in control of the plaintiffs who steadfastly refused to disclose it, as was the case in *International Union*. Finally, an adverse inference is generally discretionary, *id.* at 1339, so, even if one was proper in this case, the district court did not err in reaching a contrary factual conclusion. Appellants also offered other evidence tending to show that uniform rules were merely applied to the plaintiffs, but the district court's conclusion that plaintiffs' evidence was weightier was not clearly erroneous. We hold that the district court committed no clear error in finding that plaintiffs were likely to show that defendants' conduct in two instances violated the equal rights and free speech provisions of Title I.

Appellants' two most troubling arguments rest on two traditional precepts of equity jurisprudence: a preliminary injunction shall not alter the status quo, and it shall not grant the ultimate relief sought. These two doctrines are not entirely distinct, *see* H. McClintock, Handbook of the Principles of Equity § 15, at 33 (2d ed. 1948) (courts reluctant to issue mandatory preliminary injunctions because purpose of preliminary injunction is to preserve status quo); Leubsdorf, The Standard for Preliminary Injunctions, 91 Harv. L. Rev. 525, 534-35 (1978) (discussing connection in nineteenth century between status quo doctrine and reluctance of courts "to decree burdensome relief without a full hearing"), although the second is more clearly reflected in the federal rules, *see* Fed.R.Civ.P. 65 (a) (2) (requirements for consolidation of trial on merits with request for preliminary relief).

The traditional function of the preliminary injunction is to preserve the status quo, *e.g.*, *American Hospital Ass'n* v. *Harris*, 625 F.2d 1328, 1330 (7th Cir. 1980); *Diversified Mortg. Investors* v. *United States Life Title Ins. Co.*, 544 F.2d 571, 576 (2d Cir. 1976); *Morgan* v. *Fletcher*, 518 F.2d 236, 239 (5th Cir. 1975), so that the court

may retain its ability to render a meaningful decision on the merits, *Canal Authority* v. *Callaway*, 489 F.2d 567, 573 (5th Cir. 1974). The status quo is the "last uncontested status which preceded the pending controversy," *Westinghouse Elec. Corp.* v. *Free Sewing Machine Co.*, 256 F.2d 806, 808 (7th Cir. 1958). Application of this doctrine is discretionary with the court, *see* H. McClintock, *supra*, § 15, at 33, however, and it cannot be mechanically applied. *National Ass'n of Letter Carriers* v. *Sombrotto*, 449 F.2d 915, 921 (2d Cir. 1971). The status quo in the instant case is the Local with its elective positions filled as they were before the nomination meeting and election. This situation works a continuing, irreparable harm to plaintiffs, though, because it allows individual defendants to achieve the purpose of their likely violations of plaintiffs' rights, to maintain themselves in office.[20]

> If the current existing status quo is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury, either by returning to the last uncontested status quo between the parties, . . . by the issuance of a mandatory injunction, . . . or by allowing the parties to take proposed action that the court finds will minimize the irreparable injury. The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo.

Canal Authority v. *Callaway*, 489 F.2d at 476 (dictum). The district court faced a similar task: it had to pronounce such relief as would be agreeable to both parties and, if that was impossible, such relief as would prevent harm to plaintiffs without impinging unduly on defendants.

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[20] In view of the Local's probable violations, it cannot be supposed that invalidation of the results of the previous nominations and election would be enough, on the theory that the Local would now conduct a proper nomination meeting and election on its own.

We turn, then, to review of the shaping of the preliminary injunction.[21] On January 9, 1981, defendants filed proposed "stipulations"[22] with the district court as part of an offer to hold a new nomination meeting and election. The stipulations were substantially reflected in the preliminary injunction finally issued, paragraphs 3, 4, 5(a), 5(c), 5(d), 5(e), 5(f)(i), 5(f)(ii), 5(f)(iii), 5(g), 5(h), 5(j), 5(k), 5(l), and 5(m), *see* 521 F. Supp. at 636-38. The stipulations varied from the injunctions, however, in that the Local proposed that its supervisory body, Teamsters Joint Council 10, oversee the election (compare paragraphs 3, 5(j)), in that the Local also suggested that combined notice of nominations and election be mailed only twenty days beforehand (compare paragraph 4), and in that the district court modified the Local's suggested requirement of timely dues payments for candidates by discussing when payments were considered received and by excusing late payments of increases in dues (compare paragraph 5(f)(i)). Shortly thereafter, defendants proposed supplemental stipulations, one of which was incorporated in paragraph 5(e) of the preliminary order, and one of which was included as paragraph 5(f)(iv).

The district court on February 12, 1981, issued a proposed order that contained most of defendants' stipulations. In addition, the proposed order left open the identity of the supervisor of the nomination and election, provided that this unnamed supervisor would on request review the eligibility of members to be candidates, set out in greater detail the eligibility requirements for candidates, which included a grace period for late payment of dues increases that was not included in defendants' stipulations, declared the previous nominations and election null and void,

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[21] The injunction is reproduced as an appendix.

[22] Although we continue use of appellants' term "stipulations," these were not true factual stipulations narrowing the factual dispute but offers of settlement to which appellants agreed to be bound, if appellees so agreed.

and contained what in substance became paragraphs 5(b), 6, 7, 8, 9, and 10 of the preliminary injunction. Joint Council 10, defendants' choice as arbitrator, refused to supervise an election pursuant to any court order. Defendants, continuing to object to the district court's jurisdiction to issue an order and to the need for an order, also objected to the grace period for late payment of dues increases, the eligibility determinations by the arbitrator of the election because it usurped the union's internal procedures, and the injunction against defendants from violating the rights of members protected under 29 U.S.C. § 411. Meanwhile, the court continued to hold hearings, and both parties made further efforts to produce an acceptable order.

Plaintiffs on April 8, 1981, suggested some modifications to the proposed order, most notably provisions that Lawrence Katz and the Honest Ballot Association (HBA) arbitrate the nominations and election, that procedures for eligibility determinations to be made by the arbitrator be explained in greater detail, and that the Local pay the fees and costs of supervision and arbitration of the nomination meeting and election. Defendants objected, although not to the appointment of Katz and the HBA, but on April 21 these modifications were incorporated in a second proposed order. The only other significant additions in this order, in comparison to the first, were that disputes over candidate eligibility arising out of failure to pay dues increases were to be arbitrated and that the combined notice of nominations and election was to be mailed forty days beforehand.

This order apparently had its hoped-for effect: the parties together then offered further modifications. They agreed to the forty-day notice. They also suggested a precatory paragraph regarding verification of eligibility (now paragraph 5(*f*)(v) of the preliminary injunction), procedures for determining the eligibility of nominators, seconders, and candidates (now substantially paragraph

5(i)), a modification of the Local's liability for fees and expenses of the arbitrators (now paragraph 12), and omission of the second proposed order's provision for arbitration of candidate eligibility disputes involving failure to pay dues increases. The preliminary injunction followed on July 13, its only additional provision (the parties' joint suggestions having been accepted) being that plaintiffs were not required to post security.

This history persuades us that the district court constructed a preliminary injunction that effected as little change as possible from terms which defendants found acceptable where the status quo caused continuing harm to plaintiffs. The best course in such a case is for the parties to agree on a preliminary order, and many of the provisions of the injunction were included at the request of or with the agreement of the defendants, the objecting party here. Indeed, defendants appear to object specifically—we address elsewhere their general objection to any court-ordered election—only to two paragraphs of the injunction, 10 and 13, and to the parts of paragraph 5(f)(i) regarding the grace period for late payment of dues increases. They have not taken a position with respect to paragraphs 6, 7, and 8, but these paragraphs essentially repeat paragraphs 5(e), 5(f), and 5(l), respectively. Defendants' lack of objection to Katz and the HBA implies consent to paragraph 9. They otherwise agree to the terms of the injunction.

Defendants' objections to paragraphs 10 and 13 and part of 5(f)(i) are without merit in terms of the status quo doctrine. Paragraph 10 is entirely in keeping with the status quo; given the district court's finding that defendants probably violated 29 U.S.C. § 411(a)(1), (2), the injunction is proper and does not require conduct different from that that preceded the controversies here. Paragraph 13 is discussed below. This leaves the grace period for late payment of dues increases. Part of the case before the district court but not before us on appeal

(other than here) was an attack by plaintiffs on dues increases by the Local. The district court rejected defendants' motion to dismiss this claim, 521 F. Supp. at 630-32, but also found that plaintiffs had not shown any likelihood of success that would entitle them to preliminary relief on this claim, *id.* at 632-34. The merits of the claim have still to be decided. The grace period provision, requiring payment of the challenged dues increases but allowing them to be late, compromises the claim for purposes of the nomination and election. It thereby maintains as much as possible the status quo of the dues dispute, as well as of the Title I aspect of the case.

As a practical matter, the status quo requirement is not really applicable here. The nomination meeting was rigged; maintaining the status quo would do irreparable harm to plaintiffs. A supervised nomination meeting and election was the only relief possible. The district court sought admirably to construct an injunction with as few provisions as possible offensive to defendants.

The status quo doctrine also serves a common purpose with the doctrine that a preliminary injunction not grant the ultimate relief sought, the basis of appellants' third argument. This purpose is that relief requiring parties to change their conduct not issue until all parties, especially those to be enjoined, have had an opportunity to present their cases on the merits. The accepted doctrine is that a mandatory injunction—the equivalent of the "ultimate relief" the appellants complain about here—shall not issue before a final hearing. H. McClintock, *supra*, § 15, at 33. *See Miami Beach Fed. Sav. & Loan Ass'n* v. *Callander*, 256 F.2d 410, 415 (5th Cir. 1958) (mandatory injunction shall not issue unless facts and law are clearly in favor of applicant). At the heart of this reluctance to issue ultimate or mandatory relief is the concern that a defendant have notice of a claim against it and an opportunity to respond. *See Marshall Durbin Farms, Inc.* v. *National Farmers Organization, Inc.*, 446 F.2d 353, 356 (5th Cir.

1971) (Rule 65(a) requires notice and hearing). It would plainly be unfair and inequitable for a defendant to be enjoined in his conduct on the basis of a claim he has not had a full opportunity to respond to. This concern with due process is reflected in Fed.R.Civ.P. 65(a).[23] Under Fed.R.Civ.P. 65(a)(2), if an order granted after preliminary proceedings is characterized as final, then it is arguably invalid for the court's failure to give notice of consolidation. In the instant case, the district court did not label the injunction as final and apparently did not regard it as the final order in this case. Because compliance with the injunction—holding a new nomination meeting and election—will give plaintiffs nearly all the relief they seek, the preliminary injunction here should be subject to relatively strict notice and hearing standards.

The history of the development of the preliminary injunction in this case—reviewed above in the discussion of the status quo—reveals that the shaping of the injunction was attended with proper notice and hearing. Without repeating that history, we believe the record shows that defendants helped initiate the injunction in its present form, that the two proposed orders gave de-

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[23] Fed.R.Civ.P. 65(a) provides in relevant part as follows:

> (1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.
>
> (2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application.

We note that, although a preliminary injunction is subject to a broad notice-and-hearing test, a final injunction may be issued from what was originally only a preliminary proceeding only when the court specifically advises the parties that the preliminary proceeding is being combined with the trial on the merits. *Penn* v. *San Juan Hospital, Inc.* 528 F.2d 1181, 1186-87 (10th Cir. 1975). In the instant case, the district court suggested consolidation, the appellants objected, and the matter was not further pursued.

fendants ample notice of the injunction's proposed terms, and that defendants had opportunity over several months to present contrary arguments and evidence. Defendants also had sufficient notice of plaintiffs' claims and opportunity to controvert them, as shown by their presentation of evidence on liability in March, 1981, several weeks after development of the preliminary injunction had begun.

With regard to appellants' fourth claim, that the injunction goes well beyond the violations found by the district court, we note first that the district court enjoys great discretion in framing preliminary injunctive relief because it must draft an order sensitive to the facts of the case. *See Continental Group, Inc.* v. *Amoco Chemicals Corp.*, 614 F.2d 351, 357 (3d Cir. 1980) (district court has discretion in performing "delicate balancing" required in preliminary proceeding). We observe as well that the probable violations concerned not merely the nomination meeting but also the election because the listing of a nominee among the wrong candidates tainted the election. Accordingly, a preliminary injunction in this case could order a new, supervised nomination meeting and election. As to the particulars of the injunction, as found above, the defendants had suggested or agreed to most of the provisions of the injunction. Most of these provisions cover procedural aspects of the nominations and election, and we believe the district court acted within its discretion in outlining the procedures in accordance with the suggestions of the defendants. Perhaps the most intrusive element of the injunction is the provision for arbitration of eligibility disputes. Defendants initially objected to such a provision, but they later "stipulated" with the plaintiffs for an arbitration procedure that appears in almost identical form in the injunction, so we do not think that the arbitration can be termed excessive. As to still objected-to portions of the injunction, paragraph 10 enjoins defendants from committing violations they were found likely to have committed before and is not

excessive, and the grace period provisions of paragraph 5(f)(i) are equally inoffensive because they amount to a temporary compromise of a related and unsettled dispute. Paragraph 13 is discussed below. We conclude that none of the specific provisions of the preliminary injunction are excessive.

The conclusion that the injunction did not exceed the remedy required for the violations found likely to exist renders largely unnecessary a discussion of appellants' final argument, that their stipulations did not justify so extensive an injunction. We emphasize, however, that we do not uphold the injunction on the theory that defendants were bound by their stipulations. Rather, we believe that it was within the district court's discretion to take the stipulations into account as indications of defendants' preferences and possible future conduct, facts that would affect the quality of relief ordered. The district court could properly conclude that a new nomination meeting and election were required, and in making the appropriate order it was entitled to consider the apparent desires of the parties. Appellants also suggest that their stipulations amounted at most to consent to subject-matter jurisdiction, an invalid basis for jurisdiction, but the district court based jurisdiction on the alleged violations, not on the stipulations.

III. *The Bond Requirement*

Appellants' final contention is that the district court erred in not requiring plaintiffs to post bond as required under Fed.R.Civ.P. 65(c).[24] The district court found the

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[24] Fed.R.Civ.P. 65(c) provides in relevant part as follows:

> (c) *Security.* No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

matter of a bond requirement to be within its discretion and to depend on its evaluation of four factors: the possible harm to the enjoined party if the order is unlawful, the likelihood of applicant's success on the merits, applicant's ability to post a substantial bond or surety, and the possible adverse impact that requiring substantial security might have on the enforcement of rights created by remedial legislation. A similar test was applied in *Natural Resources Defense Council, Inc.* v. *Morton*, 337 F. Supp. 167, 168-69 (D.D.C. 1971), *aff'd on other grounds*, 458 F.2d 827 (D.C. Cir. 1972), a case on which the district court relied in part. Applying these factors, the district court observed that the policy of the LMRDA was to encourage union members' suits to vindicate union democracy and that a bond requirement would affect such enforcement adversely. It also found that plaintiff had shown a substantial likelihood of success on the merits. The district court paid less attention to the harm defendants would suffer if the order was invalid, but it did comment that until this point all the defendants had used union funds to meet their legal expenses. As to plaintiffs' ability to post bond, the district court stated that having to post it "would impose a severe financial hardship upon them."

"[T]he conclusion seems inescapable that once the court decides to grant equitable relief under Rule 65 it must require security from the applicant." 11 Wright & Miller, Federal Practice & Procedure § 2954, at 524. The amount of required security is "in such sum as the court deems proper," Fed.R.Civ.P. 65(c), which has led some courts to conclude that the requirement is actually within the district court's discretion. *See Corrigan Dispatch Co.* v. *Casa Guzman, S.A.*, 569 F.2d 300, 303 (5th Cir. 1978) (per curiam); *Urbain* v. *Knapp Bros. Mfg. Co.*, 217 F.2d 810, 815-15 (6th Cir. 1954), *cert. denied*, 349 U.S. 930 (1955). Whether bond is required subject to exceptions or is discretionary, Rule 65(c) has spawned essentially two lines of cases that, taken together, illuminate the

considerations relevant to the bond requirement. In the first, a bond is required where the injunction exposes the defendant to a risk of monetary loss. *System Operation, Inc.* v. *Scientific Games Development Corp.*, 555 F.2d 1131, 1145-46 (3d Cir. 1977); *see Reinders Bros.* v. *Rain Bird Eastern Sales Corp.*, 627 F.2d 44, 54 (7th Cir. 1980); *International Controls Corp.* v. *Vesco*, 490 F.2d 1334, 1356 (2d Cir.), *cert. denied*, 417 U.S. 932 (1974). The nature of monetary loss is not fully explained: these cases all involve commercial or financial transactions. These cases are also in some conflict as to the effect of failure to require a bond. Failure has constituted reversible error, but only as an alternative ground. *System Operations, Inc.* v. *Scientific Games Development Corp.*, 555 F.2d at 1145-46; *Telex Corp.* v. *IBM*, 464 F.2d 1025, 1025-26 (8th Cir. 1972) (per curiam). Where the injunction is otherwise upheld, the case has been remanded solely for reconsideration of the bond requirement. *Reinders Bros.* v. *Rain Bird Eastern Sales Corp.*, 627 F.2d at 54. In the second line, no bond is required in suits to enforce important federal rights or "public interests." *Bartels* v. *Biernat*, 405 F.Supp. 1012, 1019 (E.D. Wis. 1975); *Bass* v. *Richardson*, 338 F. Supp. 478, 491 (S.D. N.Y. 1971); *Natural Resources Defense Council, Inc.* v. *Morton*, 337 F. Supp. 167, 168-69; 11 C. Wright & A. Miller, *supra*, § 2954, at 528-31. The rights prosecuted in these cases arose out of comprehensive federal health and welfare statutes, and this may distinguish them by "importance" from other federal statutory rights. Moreover, some of these cases involved indigent plaintiffs, from whom it would be unjust to require security. *See Bartels* v. *Biernat*, 405 F. Supp. at 1019; *Bass* v. *Richardson*, 338 F. Supp. at 491; 11 C. Wright & A. Miller, *supra*, § 2954, at 528.

These cases suggest to us that a district court should take into account the following factors in deciding whether to require a bond. First, at least in noncommercial cases, the court should consider the possible loss

to the enjoined party together with the hardship that a bond requirement would impose on the applicant. Applicants in commercial cases—merchants, manufacturers, and others—can be assumed capable of bearing most bond requirements, so hardship to them is less of a factor. Second, in order not to restrict a federal right unduly, the impact that a bond requirement would have on enforcement of the right should also be considered. One measure of the impact lies in a comparison of the positions of the applicant and the enjoined party. A bond requirement would have a greater adverse effect where the applicant is an individual and the enjoined party an institution that otherwise has some control over the applicant than where both parties are individuals or institutions.

Three of the factors that the district court applied—burden of compliance on defendants, plaintiffs' ability to pay, and impact on plaintiffs' rights—reflected these considerations; the likelihood-of-success factor did not. This last is already adequately accounted for in the decision whether to grant preliminary relief at all and generally seems to be irrelevant to the issue of a bond requirement.[25]

The district court generally made the appropriate inquiries in determining whether to require security, and, we believe, it also reached appropriate factual conclusions that militated against a bond. No great burden will be imposed on appellants, even in the absence of security, particularly because the institutional appellant, the Local, whose contributing members include plaintiffs, will bear the cost of compliance. Plaintiffs, by contrast, are certainly less able to afford security. Finally, a bond requirement would affect enforcement of Title I rights adversely because individual union members are at a great financial disadvantage in litigating against unions. The

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[25] In cases where the likelihood of success is extraordinarily high, this factor may be an additional reason not to require a bond. The instant action, however, is not such a case, and we have no occasion to address the scope of this sometime factor.

plaintiffs' likelihood of success is irrelevant here, but because it, too, cuts against a bond requirement, it is not necessary to remand the question to the district court to weigh only the three other factors. The district court acted within its discretion in not requiring a bond.

The order of the district court is affirmed.

CAMPBELL, *Circuit Judge* (Dissenting). I disagree with the court's interpretation of the statutory scheme. While I can appreciate the difficulty of discerning Congress's intent in this puzzling area, and while I understand why the district court felt that the union election in question was improper, I am unable to read Title I as extending so far as to allow a district court, once balloting has commenced, to invalidate an election and order a new one under its supervision and under terms and conditions extemporized by the court and parties.

I might feel differently if the problem arising in the original election were such as could be cured without setting aside the first election and without holding a new one. For example, if the matter at issue were whether to count certain ballots, it could be that an order to count, or not count, would be authorized under Title I, even though the voting had commenced and the election were in progress. But given the fact that Title IV provides certain procedures for rerun elections, in which the Secretary of Labor is given a special role, I think it unreasonable to derive from Title I the authority to order some other sort of rerun election, excluding the Secretary, in cases where the complaining party reaches the courthouse door before all the ballots are counted.

The resolution this court now adopts—based on a determination that until the ballots are counted the election is not "already conducted," and that sweeping judicial relief (to the point of ordering a brand-new election under

whatever machinery suits the court) is appropriate—seems to me to be both unprecedented and beyond the contemplation of the statute. Congress, as previously noted, provided a special mechanism for holding rerun elections, with the Labor Secretary to administer the election under supervision of the court. The Supreme Court has said that the purpose of this mechanism is to minimize judicial intrusiveness into union elections and to utilize the Secretary's special expertise. In *Calhoon* v. *Harvey*, 379 U.S. 134, 140 (1964), for example, the Court recognized the congressional intent "to utilize the special knowledge and discretion of the Secretary of Labor." *Calhoon*'s emphasis on non-intrusiveness into union elections should be especially instructive for us here. *Wirtz* v. *Glass Bottle Blowers Association*, 389 U.S. 463, 470-71 (1968), also speaks of "Title IV's special function" in safeguarding the election process; the Title IV enforcement method was described as a legislative compromise between this policy and that of avoiding undue intrusiveness. Again, this should caution us against opening the door to ordering new elections under court supervision under a different format than that authorized by the union's own rules. To say that rerun elections can be ordered without Title IV's special safeguards if only the final ballot has not been counted seems to me to trench heavily into the congressional design as construed by the Court.

The rule this court now establishes would allow relief under Title I (ordering and supervising a new election) which heretofore has existed only under Title IV. I believe that the proper accommodation between Title I and Title IV requires consideration not only of the stage which the election process has reached but the nature of the relief. If a new, supervised election is required, many concerns argue against finding Title I jurisdiction: intrusiveness, delay, disruption, and the court's lack of expertise in this area, especially as compared to the Secretary. Moreover, it makes little sense for there to be two

potential rerun formats, the choice to depend on the fortuity whether the first election is invalidated before or after its completion. On the other hand, where no new election is required—for example, where only additional ballots have to be sent out—these concerns are not nearly so great. I therefore think that whether an election was "already conducted" should be determined, in part, by looking to the relief requested. This functional approach is suggested in a note in the Columbia Law Review, "Pre-Election Remedies Under the Landrum-Griffin Act," 74 Colum. L. Rev. 1105, 1124 (1974). Comments elsewhere also describe the disruptive effects of new court-ordered elections. They may be read as implicitly adopting (or at least approving) something like the approach I suggest, for they state that pre-election relief for Title I violations will not intrude upon or disrupt internal union procedures. *See* Note, "Union Elections and the LMRDA," 81 Yale L.J. 407, 558-59 (1972); Comment, "Titles I & IV of the LMRDA," 42 U. Chi. L. Rev. 166, 179 (1974); James, "Union Democracy and the LMRDA," 13 Harv. C.R.C.L. L. Rev. 247, 316-17 (1978).

The language of the statute itself lends further support to the formulation I favor. Section 483 states first that no union "shall be required by law to conduct elections of officers . . . in a different form or manner than is required by its own constitution or bylaws, except as provided by" Title IV. This should caution us to be wary of sanctioning new elections under court-imposed rules. The statute goes on to set up a dichotomy between the time "prior to the conduct" of an election, when "existing rights and remedies to enforce the constitution and bylaws" of the union are enforceable, and the time after an election is "already conducted," when only Title IV is available for "challenging an election." It seems to me that what plaintiffs are doing here really is challenging an election: they want this one thrown out, and everything begun over again. This will always be true when a new election is required. Thus, an approach looking to

the remedy seems a sensible way of deciding whether an election has already been conducted for the purposes of this statute, since the statute itself speaks of challenging the election. Moreover, Title IV explicitly gives the Secretary the power to supervise a new election after a court determination of a violation. *See* section 482(c). Title I, on the other hand, while containing a catch-all provision allowing for "appropriate" relief, including injunctions, contains no explicit reference to court supervision of an election. *See* section 412.

The approach suggested would have several benefits: it would respond to the concerns of Congress and the Supreme Court, and it would be flexible, not sanctioning court supervision of elections under Title I, but not prohibiting swift relief under Title I for violations that may be cured without a new election. This would also correspond to the dividing line between the courts' and the Secretary's expertise and areas of effectiveness.

Accordingly, I respectfully dissent from the decision and judgment of the court.

APPENDIX

July 13, 1981

PRELIMINARY INJUNCTION

For the reasons stated in the accompanying Memorandum, it is hereby ORDERED and DECLARED that:

1. The order entered by the court on December 12, 1980 is modified as set forth below.

2. The nominations received at the November 9, 1980 meeting of defendant Local 82, and the election originally scheduled to be completed on December 13, 1980, are legally without effect pending further order of this court. The ballots from that election shall remain in the custody of an officer of this court.

3. Local 82 shall provide for a nomination meeting and mail ballot election for the officers of Local 82, to be supervised and conducted by Lawrence Katz, Esquire, in conjunction with the Honest Ballot Association of New England ("the Arbitrators") in accordance with paragraph 9 of this order. The nomination meeting shall be held within 80 days of the entry of this order. Subject to applicable law and this order, the nomination meeting and election shall be conducted in accordance with the Constitution and By-laws of Local 82, and the Constitution of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

4. Under the supervision of the Arbitrators, Local 82 shall mail each member a combined notice of the nomination meeting and election at his last known home address at least 40 days before the date of the nomination meeting, and, in addition, shall mail notices for posting at least 40 days before the date of the nomination meeting to the stewards or, if there is no steward, to the employer, at the facilities of all employers that have collective bargaining agreements with Local 82.

5. The combined notice of nomination and election will contain the following information:

(a) The date, time and place of the nomination meeting.

(b) A declaration that:

> The purpose of this meeting will be the nomination of officers for Local 82. After hearings in the Federal District Court, the incumbent officers of Local 82 have offered to have, and the court has ordered, a new election, which will be conducted by a third party in order to assure that the nominations and election are conducted in a fair and orderly fashion.

(c) The list of offices to be filled: President and Business-Agent, Vice-President, Secretary-Treasurer and Business-Agent, Recording Secretary, and three Trustees, all of whom together constitute the Executive Board.

(d) The officers elected in the upcoming election will complete the term of office which commenced on January 1, 1981 and which will expire on December 31, 1983.

(e) The eligibility requirements for members to attend the nominations meeting: Every member whose dues are paid up through the month before the month in which the nomination meeting is conducted has the right to attend the nomination meeting. Members may be admitted to the nomination meeting upon presentation of a TITAN computer receipt showing payment through the prior month or upon presentation of a TITAN receipt supplemented by payment at the door or payment evidenced by a temporary receipt, which TITAN receipt and other evidence taken together verify payment of dues through the prior month. Local Union officers, or their designated agents, shall receive dues payments at the door and shall issue temporary dues receipts therefor.

(f) The eligibility requirements to run for office:

(i) Every member in good standing, by the payment of his dues on or before the last business day of the current month, in accordance with the International Constitution, who has been in such continuous good standing for each consecutive month in the twenty-four (24) month period immediately prior to nominations, shall be eligible to hold office if otherwise qualified under the International Constitution, Local By-Laws and applicable law. Dues are considered to have been received by the Local Union when they are in the physical possession of the Union or its authorized agent. Thus, dues paid by mail are received when the dues are delivered to the Union; dues paid in person at the Union are received at the time tendered; and dues paid to a steward, business agent, or other authorized collection agent are received when paid to the agent. Payment of dues after their due date does not restore good standing status for such month in computing the continuous 24 month good standing status as a condition of eligibility for office. However, a member who has made an incorrect dues payment in any month in which the rate of dues has been changed shall be considered in good standing for the month(s) in question so long as he paid the difference in the rates of dues owed to the Local Union before the start of the nomination meeting scheduled under the order of this court.

(ii) A member otherwise qualified to run for office must be nominated at the nomination meeting by a member in good standing other than the nominee and seconded by a member in good standing other than the nominee. A member is entitled to nominate or second the nomination of only one candidate for each office.

(iii) The 50% meeting attendance eligibility requirement contained in Article VI of the Local Union By-Laws is waived for this nomination and election.

(iv) In order to be nominated for office, a member must either be present at the nomination meeting to accept the nomination or must have a signed statement indicating his acceptance of nomination for a particular office delivered to the presiding official at said meeting.

(v) Members intending to run for office are urged to verify their own eligibility as well as the eligibility of their potential nominators and seconders prior to the nominations meeting by making a request, in writing, to the Arbitrators. The Arbitrators shall render decisions concerning the eligibility of any candidate, nominator, or seconder, in accordance with the procedures set forth in paragraph 5(i) of this notice.

(g) The nomination and election rules are set forth in the Local By-Laws and International Constitution which are available for inspection at the Local 82 offices and may be purchased upon payment of $.50.

(h) All officers and business agents elected in the forthcoming election shall, by virtue of such election, be delegates to any International Convention which may take place during their term of office, and the officers elected in the forthcoming election shall be delegates to all Teamster subordinate bodies and all other conventions in accordance with the provisions of Article II, Section 4(f) and Article III, Section 5 of the International Constitution.

(i) Any member may request in writing that the Arbitrators review his eligibility to hold office, or to participate in the nominations meeting as a nominator or seconder at any time after the mailing of the notices of the nominations meeting and before the nominations meeting. The Arbitrators shall make a report on the eligibility of that member within seven days thereafter to any interested member. Any member may challenge

the determination of the Arbitrators that a member is either eligible or not eligible to be a candidate for office, or be a nominator or seconder at the nominations meeting. Any challenge to a decision of the Arbitrators must be made, in writing, within two days of the Arbitrators' decision and must set forth the ground on which the challenge is based. The Arbitrators shall hear the challenge and make a written determination within five days of receiving the challenge. Any member asserting that the Arbitrators' determination of the facts underlying his claim for eligibility is not supported by substantial evidence must file a request to set aside the Arbitrators' decision with the Arbitrators within five days of the decision, for transmittal to the court along with a report by the Arbitrators.

After the nominations meeting, the Arbitrators shall review the eligibility of any candidate whose eligibility had not previously been determined and shall make a determination of each such candidate's eligibility within 48 hours of the nominations meeting. If, following the nominations meeting, the Arbitrators determine that a candidate is ineligible, he shall notify the candidate by telephone within 48 hours of the nominations meeting and shall confirm this communication to the candidate in writing. In addition, the Arbitrators shall notify counsel for the plaintiffs and defendants by telephone of the eligibility determinations made following the nominations meeting, within 48 hours of the nominations meeting, and shall confirm this communication to counsel in writing. Challenges to the decisions of the Arbitrators concerning the eligibility of the nominees must be filed, in writing, with the Arbitrators within 48 hours of the Arbitrators' decision and must set forth the specific basis upon which the challenge is made. The Arbitrators shall hear the challenge and make a written determination within 7

days. Any member wishing to appeal the determination of the Arbitrators must file a request to set aside the Arbitrators' decision with the Arbitrators within 48 hours of the decision for transmittal to the court along with a report by the Arbitrators.

j. All arrangements for distribution of campaign literature shall be made by the Arbitrators consistently with the By-Laws, International Constitution and applicable law.

k. The election shall be conducted by mail ballot. The notice will specify the date ballots and other election materials and instructions will be mailed, the date and time ballots will be collected for counting, and the location of the ballot count. The notice will also specify that voting packets will be mailed to each member's last known home address at least 20 days before the counting of the ballots. The notice will describe the procedure to be followed to obtain a ballot if the member does not receive a ballot in the mail. If two ballots are received from the same member, both will be declared null and void and not counted.

l. A member's vote will be counted only if he has paid his dues through the month prior to the month in which the election is held. Members may pay their dues before the close of business at 5:00 p.m. on the day before the counting of the ballots.

m. Each candidate, at his own expense, shall have the right to have an observer other than himself present for the mailing of ballots, the removal of ballots from the post office, and the subsequent counting of the ballots.

6. All members meeting the eligibility criteria set forth in paragraph 5(e) shall be permitted to attend the nominations meeting.

7. All members meeting the eligibility criteria set forth in paragraph 5(f) shall be permitted to run for office.

8. All members meeting the eligibility criteria set forth in paragraph 5(l) shall be permitted to vote.

9. The Arbitrators seeking to supervise and conduct the nominations and election required by this order shall file an undertaking with the court indicating their consent to the terms and conditions of this order, and in addition, shall:

a. Provide for the designation of an official to answer inquiries and make reports on members' eligibility to hold office as set forth in paragraph 5(i).

b. Make all arrangements for distribution of campaign literature as set forth in paragraph 5(j) of this order.

c. Ensure that no member of the Arbitrators who participates in the supervision or conduct of the nomination and election required by this order shall have any interest in the outcome of the election.

10. Defendants Bart A. Griffiths, George Harris, and Local 82 are enjoined from violating the equal rights of members of Local 82, guaranteed by 29 U.S.C. § 411,

(a) to nominate candidates in the election to be conducted in accordance with this order, to vote in the election, to attend all meetings of Local 82 in which business related in any way to this election is conducted, and to participate in the deliberations and voting upon business of such meetings, subject to the rules and regulations of the constitution and bylaws of the union;

(b) to meet and assemble freely with other members and to express any views, arguments, or opinions relating to the nominations and election to be conducted in accordance with this order, and to express, at meetings of Local 82 in which business is conducted relating in any way to this election, any views upon candidates or upon any business properly before such meetings, subject to the rules and regulations established in this order and in the rules

and regulations of the constitution and bylaws of the union.

11. This order shall remain in effect until further order of this court.

12. Local 82 shall pay the fees and expenses incurred by the Arbitrators in discharging their responsibilities under this order in the amount determined by the Court and shall advance to the Arbitrators the amounts necessary to cover the postage required to mail the notices and balloting materials necessitated by this order.

13. Plaintiffs are not required to post a security under Fed. R. Civ. P. 65(c).

Robert E. Keeton
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 81-1545

JEROME CROWLEY, ET AL.,
Plaintiffs, Appellees,

v.

LOCAL NO. 82, FURNITURE and PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN, and PACKERS, ET AL.,
Defendants, Appellants,

RAYMOND J. DONOVAN, SECRETARY of LABOR, U.S. DEPT. of LABOR,
Intervenor.

JUDGMENT

Entered: May 21, 1982

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed.

By the Court:

/s/ Dana H. Gallup
Clerk

[cc: Messrs. Witlen, Pressman, and Ms. Webman]

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 81-1545

JEROME CROWLEY, ET AL.,
Plaintiffs, Appellees,

v.

LOCAL NO 82, FURNITURE and PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN, and PACKERS, ET AL.,
Defendants, Appellants.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Intervenor.

Before COFFIN, *Chief Judge*,
CAMPBELL, BOWNES and BREYER, *Circuit Judges*.

ORDER OF COURT

Entered June 15, 1982

The petition for rehearing and the suggestion for rehearing en banc filed on June 4, 1982, are hereby denied.

By the Court:

/s/ Dana H. Gallup
Clerk

[cc: Mss. Noonan, Webman, Messrs. Pressman and Witlen.]

APPENDIX E

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959

TITLE I
BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS

BILL OF RIGHTS
(29 U.S.C. 411)

Sec. 101. (a) (1) Equal Rights.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of Speech and Assembly.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(3) Dues, Initiation Fees, and Assessments.—Except in the case of a federation of national or international labor organizations, the rate of dues and initiation fees pay-

able by members of any labor organization in effect on the date of enactment of this Act shall not be increased, and no general or special assessment shall be levied upon such members, except—

(A) in the case of a local organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constitutent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

* * * *

(5) Safeguards Against Improper Disciplinary Action.—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable

time to prepare his defense; (C) afforded a full and fair hearing.

(b) Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

CIVIL ENFORCEMENT
(29 U.S.C. 412)

Sec. 102. Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

TITLE IV
ELECTIONS

TERMS OF OFFICE; ELECTION PROCEDURES
(29 U.S.C. 481)

Sec. 401. (a) Every national or international labor organization, except a federation of national or international labor organizations, shall elect its officers not less often than once every five years either by secret ballot among the members in good standing or at a convention of delegates chosen by secret ballot.

(b) Every local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing.

(c) Every national or international labor organization, except a federation of national or international labor organizations, and every local labor organization, and its officers, shall be under a duty, enforceable at the

suit of any bona fide candidate for office in such labor organization in the district court of the United States in which such labor organization maintains its principal office, to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization and to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members, and whenever such labor organizations or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution. Every bona fide candidate shall have the right, once within 30 days prior to an election of a labor organization in which he is a candidate, to inspect a list containing the names and last known addresses of all members of the labor organization who are subject to a collective bargaining agreement requiring membership therein as a condition of employment, which list shall be maintained and kept at the principal office of such labor organization by a designated official thereof. Adequate safeguards to insure a fair election shall be provided, including the right of any candidate to have an observer at the polls and at the counting of the ballots.

(d) Officers of intermediate bodies, such as general committees, system boards, joint boards, or joint councils, shall be elected not less often than once every four years by secret ballot among the members in good standing or by labor organization officers representative of such members who have been elected by secret ballot.

(e) In any election required by this section which is to be held by secret ballot a reasonable opportunity shall

be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof. Not less than fifteen days prior to the election notice thereof shall be mailed to each member at his last known home address. Each member in good standing shall be entitled to one vote. No member whose dues have been withheld by his employer for payment to such organization pursuant to his voluntary authorization provided for in a collective bargaining agreement shall be declared ineligible to vote or be a candidate for office in such organization by reason of alleged delay or default in the payment of dues. The votes cast by members of each local labor organization shall be counted, and the results published, separately. The election officials designated in the constitution and bylaws or the secretary, if no other official is designated, shall preserve for one year the ballots and all other records pertaining to the election. The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this title.

(f) When officers are chosen by a convention of delegates elected by secret ballot, the convention shall be conducted in accordance with the constitution and bylaws of the labor organization insofar as they are not inconsistent with the provisions of this title. The officials designated in the constitution and bylaws or the secretary, if no other is designated, shall preserve for one year the credentials of the delegates and all minutes and other records of the convention pertaining to the election of officers.

(g) No moneys received by any labor organization by way of dues, assessment, or similar levy, and no moneys of an employer shall be contributed or applied to promote the candidacy of any person in an election subject to the provisions of this title. Such moneys of a labor organization may be utilized for notices, factual statements of issues not involving candidates, and other expenses necessary for the holding of an election.

(h) If the Secretary, upon application of any member of a local labor organization, finds after hearing in accordance with the Administrative Procedure Act that the constitution and bylaws of such labor organization do not provide an adequate procedure for the removal of an elected officer guilty of serious misconduct, such officer may be removed, for cause shown and after notice and hearing, by the members in good standing voting in a secret ballot conducted by the officers of such labor organization in accordance with its constitution and bylaws insofar as they are not inconsistent with the provisions of this title.

(i) The Secretary shall promulgate rules and regulations prescribing minimum standards and procedures for determining the adequacy of the removal procedures to which reference is made in subsection (h).

ENFORCEMENT
(29 U.S.C. 482)

Sec. 402. (a) A member of a labor organization—

(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,

may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any

provision of section 401 (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this title and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

(c) If, upon a preponderance of the evidence after a trial upon the merits, the court finds—

(1) that an election has not been held within the time prescribed by section 401, or

(2) that the violation of section 401 may have affected the outcome of an election,

the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization. The Secretary shall promptly certify to the court the names of the persons elected, and the court shall thereupon enter a decree declaring such persons to

be the officers of the labor organization. If the proceeding is for the removal of officers pursuant to subsection (h) of section 401, the Secretary shall certify the results of the vote and the court shall enter a decree declaring whether such persons have been removed as officers of the labor organization.

(d) An order directing an election, dismissing a complaint, or designating elected officers of a labor organization shall be appealable in the same manner as the final judgment in a civil action, but an order directing an election shall not be stayed pending appeal.

APPLICATION OF OTHER LAWS
(29 U.S.C. 483)

Sec. 403. No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by this title. Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this title. The remedy provided by this title for challenging an election already conducted shall be exclusive.

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 80-2680-K

JEROME CROWLEY, *et al.*,
Plaintiffs

v.

LOCAL NO. 82, *et al.*,
Defendants

December 12, 1980

TEMPORARY RESTRAINING ORDER

For the reasons stated in the court's Memorandum of this date, and in order to avoid irreparable harm to the plaintiffs and preserve both the status quo and the jurisdiction of this court, it is hereby ORDERED that, pending further order of this court:

The ballots to be received by Local 82 from P.O. Box 530, East Milton, Massachusetts, on December 13, 1980 at 9:00 a.m. and any other ballots received by Local 82 in any other way shall not be counted but shall be collected, sealed, and delivered immediately thereafter to an officer of this court in whose custody they shall remain until further order of the court. If the court determines, after hearing, that the ballots collected on December 13, 1980 should be counted, they shall be counted under the same conditions and limitations prevailing on December 13, 1980, unless otherwise ordered by the court.

It is further ordered that the following notice be read to those in attendance for the previously scheduled opening and counting of ballots:

By order of the United States District Court for the District of Massachusetts the ballots received by Local Union No. 82 from P.O. Box 530, East Milton, Massachusetts on December 13, 1980 at 9:00 a.m. shall be sealed, secured, kept within the control of the court, and not counted until further order of this court.

If the court determines, after hearing, that the ballots collected on December 13 shall be counted, then unless otherwise ordered by the court they shall be counted under the same conditions and limitations which prevailed on December 13, 1980.

/s/ Robert E. Keeton
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ 82-811 PHX-EHC

FRANK CANEZ, *et al.*,
Plaintiffs,

v.

EDWARD GUERRERO, *et al.*,
Defendants.

MEMORANDUM AND ORDER

On May 28, 1982, Plaintiffs, individual members in good standing in the Construction, Production & Laborers' Union Local No. 383, filed a complaint under the Labor-Management Reporting and Disclosure Act ["LMRDA"], 29 U.S.C. § 401 *et seq.*, against (1) the individual officers and executive board members of Local 383, (2) the affiliated International Union, (3) Local Union 383 and (4) William Soltero, Sr. The complaint alleges that the Defendants conduct with respect to the regularly scheduled election of union officers, presently set to begin on Monday, June 7, 1982, and continue to Saturday, June 12, 1982, has denied them the "equal rights and privileges to nominate candidates and to vote in elections. . ., to attend membership meetings and to participate in the deliberations and voting [of] the business . . ." of Local 383, in violation of Title I of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 411-415.

On May 28, 1982, the Court entered an order requiring Defendants to appear and show cause on Thursday,

June 3, 1982, why a temporary restraining order and preliminary injunction should not be entered prohibiting Defendants from "any action or conduct in contravention of the Labor-Management Reporting and Disclosure Act". In accordance with this order, an evidentiary hearing was held on June 3, 4 and 5, 1982, at which all parties appeared represented by counsel.

The Court has considered Plaintiffs' verified complaint and amended complaint seeking injunctive relief, all relevant material filed in support of such application, the testimony of Plaintiffs' witnesses and exhibits admitted in evidence by Plaintiffs. Defendants specifically deny Plaintiffs' allegations made herein. However, in light of the immediacy of the election Defendants have agreed to the provisions of the preliminary injunction without consenting to the Court's jurisdiction or findings of fact contained in this memorandum, or waiving their right to present evidence at any subsequent proceeding in this case.

The Court has concluded based upon the present record that (1) jurisdiction over this matter is conferred on this Court pursuant to Title I of the LMRDA, 29 U.S.C. § 412, and (2) a preliminary injunction in the form of a supervised election must issue. The terms of such injunction are embodied in a separate document attached to this Memorandum entitled "Preliminary Injunction."

I. *JURISDICTION*

Title I of the LMRDA, embodies the "Bill of Rights" for rank and file union members and guarantees, among other things, that all members shall have "equal rights and privileges" to participate in the nomination and election of candidates. Specifically, Title I was enacted to provide union members with rights parallel to those guaranteed by the United States Constitution in order to further the Act's "primary objective of ensuring that unions would be democratically governed and responsive

to the will of their memberships." *Finnegan v. Leu*, —— U.S. ——, 50 U.S.L.W. 4480, 4481 (decided May 17, 1982 by the United States Supreme Court) (citations omitted). The enforcement of Title I rights is conferred upon the district courts pursuant to 29 U.S.C. § 412.

Title IV of the LMRDA, 29 U.S.C. § 481 *et seq.*, guarantees that any member in good standing has the right to become a candidate for union officer and protects union members from the application of unreasonable rules. *Crowley v. Local No. 82*, slip op. No. 81-1545 (1st Cir. decided May 21, 1982). Enforcement of these rights are within the exclusive jurisdiction of the Secretary of Labor.[1]

Plaintiffs contend that the claimed violations fall squarely within this Court's Title I jurisdiction. In response, Defendants argue that the claimed violations are more properly characterized as Title IV matters and are thus within the Secretary's exclusive jurisdiction, and beyond the scope of this Court's jurisdiction. The Court is of the opinion that Plaintiffs have alleged both Title I and Title IV matters. Nevertheless, the presence of legitimate Title I claims is sufficient to confer federal jurisdiction pursuant to 29 U.S.C. § 412 on this Court.

The Court concludes that Title I jurisdiction may properly be exercised based upon the following:

1. Procedures followed at the May 8, 1982, nominating meeting violated due process and discriminated against persons seeking to be nominated and run against incumbent office holders. Such procedures allowed incumbents to be listed first for each office on the official ballot.

---

[1] This memorandum will not address various provisions in Local 383's constitution which appear to present clear violations of Title IV of the LMRDA. Cf. *Crowley v. Local No. 82, etc.*, 521 F. Supp. 614 (D.Mass. 1981).

2. The restraints placed by the incumbents with respect to the free and full discussion of material issues before the membership at the May 22, 1982, "monthly meeting", regarding the election date and hours, and the polling places.

3. The effective disenfranchisement of portions of the union membership, including dissidents, resulting from the timing of the election by the incumbent officers and notice of such election to union membership. The schedules for such election and notice served to reduce the number of potential voters for those opposing incumbents.

4. The historic pattern of intimidation directed at individual members who oppose the incumbent officers. This pattern dates back to the June 1979, election and has continued up to the present. The acts of intimidation include (a) condoning if not encouraging the massing of members supporting the incumbent officers in the immediate proximity of the voting area; (b) encouraging drinking in the immediate vicinity of the voting area, (c) distributing pro-incumbent materials at the entrance to the voting area, (d) assaulting individuals during the union meetings who oppose the incumbents, (e) preventing dissident members from speaking at union meetings, and (f) verbally abusing dissident union members who are able to speak at union meeting.

II. PRELIMINARY INJUNCTION

In the Ninth Circuit, a plaintiff meets its burden of proof with respect to the issuance of a preliminary injunction by demonstrating either of the following:

1. a combination of probable success on the merits and possibility of irreparable injury; or

2. that serious questions are raised and the balance of hardships tips sharply in its favor.

Los Angeles Coliseum Com'n. v. National Football, 634 F.2d 1197 (9th Cir. 1980).

For the reasons which follow, the Court finds that Plaintiffs have shown a likelihood of success on the merits and that irreparable injury will occur if the preliminary relief requested is not granted.

With respect to Plaintiffs' probable success on the merits, the testimony at the hearing established that Plaintiffs will very likely prevail on their claims that Defendants' conduct in setting the election procedures, dates and sites, and actions by Defendants at the May 22, 1982, monthly meeting violated their Title I rights. The election notices appear to have been prepared prior to the approval by the membership of such notices. Union members wishing to be recognized for the purpose of objecting to the matters contained in such notices were either not recognized, or not provided sufficient time to voice their objections. The notices which were mailed following the May 22, 1982, meeting have not been received to date by many union members eligible to vote. Dissident members were not afforded equal access to the election ballot to prepare sample ballots for their slates.

The Court finds further that if a preliminary injunction, in the form of a judicially supervised election, is not granted then despite the probable Title I violations, the June 7, 1982, election will be held, and Plaintiffs will be relegated to pursuing their post-election remedies while the incumbent officers remain in office. The Court agrees with the District Court's reasoning in *Crowley v. Local No. 82, Etc.*, 521 F.Supp. 614, 627 (D.Mass. 1981), that such a result constitutes irreparable injury and justifies the issuance of a preliminary injunction.

With respect to the bond requirement of Rule 65(c), F.R.Civ.P., the Court finds that as in *Crowley v. Local No. 82, Etc., supra*, the facts of this case do not warrant that Plaintiffs post bond.

Accordingly,

IT IS ORDERED that Plaintiffs' Application For A Preliminary Injunction is granted in accordance with the terms and conditions provided for in the preliminary injunction order attached hereto.

IT IS FURTHER ORDERED that this Memorandum and Order, excepting the preliminary injunction order attached, shall be sealed by the Clerk of this Court until the American Arbitration Association has certified the election results for Local 383. Such memorandum shall not be used by the parties for any election purposes.

Dated this 5 day of June, 1982.

/s/ Earl H. Carroll
United States District Judge

APPENDIX H

EXHIBIT 12

ELECTION OF OFFICERS AND BUSINESS AGENTS BY MAIL BALLOTS—THIS OFFICE PREPARES FOR A REFERENDUM THIS YEAR

Under authority granted to all Local Unions by action of the International Convention held June 14-17, 1976 in Las Vegas, Nevada, the Executive Board of Local 82 has authorized that this year Teamsters Local 82 will conduct the election for Executive Board Officers and Business Agents by means of a secret ballot by mail, thus affording members an unprecedented opportunity to vote for the candidates of their choice with a maximum of convenience, privacy and time to consider their decisions.

The International Convention adopted provisions of Article XXII, Section 4(b) which states "—the Local Union Executive Board shall have the authority to establish all rules and regulations for the conduct of the election to supplement the provisions of the International Constitution, including the authority to use mail referendum balloting without membership approval".

By unanimous action of the Local 82 Executive Board meeting held Tuesday, September 16, 1980, the decision was made to inaugurate an election by mail referendum because of the multitude of advantages the procedure offers members.

ELECTION RULES AND REGULATIONS

In Conformity With the
Teamsters International Constitution,
Article 6, Section 5(b) of Local By-Laws

APPLICABLE FEDERAL STATUTES

The International Constitution provides that:—

'The Election shall be held at such place or places and at such time, not earlier than thirty (30) days after the

NOMINATION MEETING, as may be decided by the Local Union Executive Board. The Local Union Executive Board shall have the authority to establish all rules and regulations for the conduct of the election to supplement the provisions of the International Constitution, including the authority to use mail referendum balloting or absentee balloting without membership approval.

"All Officers (and Business Agents) elected in the forthcoming election shall, by virtue of such election, be delegates to any International Convention which may take place during their term of office and the Officers elected in the forthcoming election shall be delegates to all Teamster subordinate bodies and all other conventions in accordance with the provisions of Article II, Section 4(f) and Article III, Section 5 of the International Constitution."

Therefore, pursuant to Article XXII, Section 4(b) and in accordance with instructions received from the International Union, the Executive Board has ordered that a General Election will be conducted by mail referendum with ballots to be counted at 9:00 A.M., Saturday, December 13, 1980. The Secretary-Treasurer will supply the Election Committee with a Post Office Box specifically set aside for receipt of mailed ballots, a check list and all other materials to safeguard the honest and fair conduct of such election.

Each candidate, duly nominated, shall be granted the right to be present and/or have an observer at the candidate's own expense present for the removal of ballots from the Post Office Box, at 9:00 A.M., Saturday, December 13, 1980, by the Election Committee and the counting of ballots subsequently in Union Headquarters, 142 Robertson Street, Quincy, Mass.

At least fifteen (15) days prior to the official counting of the secret referendum vote, each eligible member shall receive at his last known home address through the U.S.

Mail a packet containing 1) a ballot listing the names of all duly nominated candidates for the Executive Board and/or the position of Business Agent. The packet also shall contain 2) notice of election; 3) instructions for voting 4) a return envelope.

Each Candidate and/or their Observer are hereby notified that they have the right to observe the counting of the ballots by the Election Committee.

EXHIBIT 42

OFFICIAL BALLOT

LOCAL UNION No. 82

[SEAL]

Election of Officers
For a Three Year Term

MAIL BALLOT BACK BY
DECEMBER 12, 1980

SO YOUR VOTE WILL COUNT, YOUR DUES MUST BE PAYED FOR THE MONTH OF NOVEMBER

SEND DUES IN SEPARATE MAILING

OPEN AND MARK YOUR BALLOT

ELECTION DAY, DECEMBER 13, 1980

9:00 A.M.

COUNTING OF BALLOTS

TO VOTE FOR A PERSON, MAKE A CROSS (X) IN BOX TO THE RIGHT OF THE NAME.

President-Business Agent	Vote for One
George Harris (Incumbent)	☐
John J. Perry	☐
John P. Lynch	☐

Trustees	Vote for Three
Kevin Sullivan (Incumbent)	☐
Robert J. Byrnes	☐
Wilfred Pye	☐
Joseph Crowley	☐

No. 82-432

Office-Supreme Court, U.S.
FILED
MAY 2 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LOCAL NO. 82, FURNITURE AND PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN, AND PACKERS; BART GRIFFITHS, SECRETARY-TREASURER, LOCAL NO. 82; GEORGE HARRIS, PRESIDENT, LOCAL 82; PHILLIP PIEMONTESE, CHAIRMAN OF THE ELECTION COMMITTEE OF LOCAL NO. 82; and JOHN DOE, JAMES DOE and JEROME DOE, MEMBERS OF THE ELECTION COMMITTEE OF LOCAL NO. 82,

Petitioners,

RAYMOND DONOVAN, SECRETARY OF LABOR,

Intervenor,

v.

JEROME CROWLEY, ANTHONY COYNE, JOSEPH FAHEY, ROBERT LUNNIN, JAMES HAYES, GERALD OWENS, JOHN LYNCH, JOSEPH TRASK, JOSEPH MONTAGNA, and DENNIS BATES,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 13, 1982
CERTIORARI GRANTED JANUARY 24, 1983

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FROM DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

[Case Title Omitted in Printing]

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1980		
Dec. 1	01	Complaint filed.
	02	Motion for a disinterested party to serve process filed and ALLOWED by the Court, David Bolden, Deputy Clerk.
	03	Motion for preliminary injunction, filed, c/s.
	04	Order to show cause issued, returnable 12/5/80 at 9 AM. entered 12/4/80.
	05	Appearance of Ms. Noonan for deft filed.
	06	Return of summons wso various defts' filed.
	07	Affidavit of Robert Lunnin filed.
	08	Affidavit of Jerome Crowley filed.
	09	Affidavit of Anthony Coyne filed.
	10	Affidavit of Joseph Montagna filed.
	11	Modified motion for prel inj filed.
	12	Affidavit of various members of Local 82 filed.
	13	Affidavit of James H. Packer filed.
	14	Letter from Mr. Harris to Mr. Lunnin, the Executive Board Decision from the trial of 11/24/80, filed.
	15	Notice of Amendment of complaint filed.
Dec. 5		KEETON, D. J. Rptr. Jones-Horwitz; hearing on application for preliminary injunction; arguments; briefs on jurisdictional question due on Monday, 12/8/80 at 11 AM.

DATE	NR.	PROCEEDINGS
1980		
Dec. 8	16	Pltfs' contents of memo of law filed.
	17	Supp citations to pltfs' memo of law filed.
	18	Pltfs' memo of law filed.
	19	Defts' memo of law filed.
	20	Affidavit of Maxine Tassinari-Teixeira filed, c/s.
	21	Pltf's proposed findings of fact and conclusions of law filed. c/s.
Dec. 11	22	Affidavits of various members of Local No. 82 filed.
	23	Affidavit of Christopher Fahey filed.
Dec. 12		*KEETON, D.J.* Rpt. Jones-Horowitz; hearing; defts' challenge to jurisdiction denied; deft to file response to pltfs' proposed findings by Monday 12/15/80 at noon; should deft wish to file substitute findings, it must file them on pltf by 12/15/80 at noon; if so, pltf must respond by 12/16/80; deft to deliver specified discovery materials to plts on 12/15/80 at noon; further hearing at 4:05 p.m. arguments; bond not required T.R.O. entered 4:20 p.m.; Prel. Inj. recessed until 9 A.M. 12/16/80 or as soon thereafter as the hearing may continue.
Dec. 15	24	*KEETON, DJ.* TEMPORARY RESTRAINIG ORDER, dated December 12, 1980, entered.
15	25	*KEETON, DJ.* Memorandum, dated December 12, 1980, entered.
13		Received in the Clerk's Office, Sealed, on December 13, 1980 at 9:50 A.M. Ballot Box with ballots, received by Daniel F. Loughry,

DATE	NR.	PROCEEDINGS
1980		
		Deputy Clerk, also received returned ballots as undelivered in envelope, both received sealed and put in vault.
16	26	Transcript of hearing on Friday, December 12, 1980, filed.
22	27	Answer to amended complaint, filed.
19		*KEETON, D.J.* Rpt. Jones-Horwitz; hearing resumed; pltf's evid, recess; pltf's evid. continues; recessed until 12/23/80 at 9:00 a.m.
23		*KEETON, D.J.* Rpt. Janes; hearing resumed; pltf's evid continues; pltf's rest; recess; deft's evidence; recessed until 12/24/80 at 9:00 a.m.
24		*KEETON, D.J.* Rpt. Janes; hearing resumed; deft's evidence continues; recessed until 12/30/80 at 9:00 a.m.
30		*KEETON, D.J.* Rpt. Scott; hearing resumed; deft's evidence continues; recess.
31		*KEETON, D.J.* Rpt Scott; hearing resumed; deft's evidence continues; deft rests; pltf's rebuttal; rests; deft's rebuttal; rests; require submissions from both parties by Friday Jan 30, 1981 recessed.
1981		
Jan. 9	28	Letter to the Court from Ms. Noonan, Esq, filed.
9	28	*KEETON, D.J.* Rpt. Jones-Horwitz; conference; timetable previously established deferred by one week; further conf. 1/15/81.

DATE	NR.	PROCEEDINGS
1981		
15		*KEETON, D.J.* Rpt. ; conference; pltfs memo due 1/20/81; timetable previously established deferred though next hearing; hearing set for 1/23/81 at 12 noon or 1/28/81 at 2:30 p.m.
15	29	Stipulations of the defts, filed.
16	30 thru 33	Transcripts of hearings, filed.
Jan. 20	34	Letter to Judge Keeton, from Mr. Pressman, Esq. filed.
20	35	Pltfs' memo in opposition to the defts' proposal of Jan. 15, 1981, filed c/s
20	36	Proposed Order, filed.
22	37 thru 41	Transcripts of hearings and first day of trial, filed.
	42	Supp. stipulations of the defts filed. c/s.
	43	Motion for leave to allow Garry S. Witlen to practice . . . filed, c/s.
	44	Deft's supp memo filed, c/s.
23	45	Stipulation of the parties, filed.
28	46	Affidavit, filed.
30	47	Defts' second supp memo filed, c/s.
23		KEETON, D.J. Rptr Jones-Horwitz; hearing; motion for Mr. Witkin's appearance allowed; in absence of stipulation, Court vacates stay of discovery as of 5:00 PM today. Further submissions due 1/30/81 if stipulation reached; further hearing 2/9/81 at 2 PM. If no stipulation reached, further submissions due three days before 2/9/81 hearing.

DATE	NR.	PROCEEDINGS
1981		
30	48	Pltfs' motion to amend complaint . . . filed.
	49	Memo in support of 48 filed.
	50	Pltf's reply memo filed.
	51	C/s filed.
Feb. 9	52	Defts' memo in opposition to pltfs' motion to amend complaint, filed.
13	53	*KEETON, D.J.* Order dated Feb. 12, 1981, entered, cc/cl.
17	54	Response of defts to proposed order concerning the conduct of the election, filed, c/s.
18	55	Pltfs' objections to proposed Order of the Court dated Feb. 12, 1981, filed.
Feb. 18	56	Supplemental reply Memo, filed.
20		KEETON, D.J. Rptr Jones-Horwitz; hearing; motion regarding objections to mootness denied; motion of lack of jurisdiction denied; proposed order reviewed; further hearing on 2/24/81 at 12 NOON; motion to amend the complaint; arguments; ruling on this motion deferred; motion regard supplementary relief; arguments; ruling deferred.
23	57	Copy of letter to Ms. Noonan and Mr. Pressman from Mr. Reilly, filed.
23	58	Pltfs' supplemental memorandum on motion to amend complaint, filed, c/s.
March 3	59	Defts' proposed findings of fact with regard to the issued raised in the second amended complaint, filed.
4	60	Defts' motion to dismiss pltfs' second amended complaint, filed. c/s

DATE	NR.	PROCEEDINGS
1981		
4	61	Memo in support of #60, filed. c/s
4	62	Affidavit of Richard C. Bell, filed. c/s
9	63	Pltfs' response to defts' proposed findings of fact with regard to the issues raised in the second amended complaint; filed.
6		*KEETON, DJ.* Rpt. Jones-Horwitz; hearing; pltf to file memo on motion to dismiss then Court will take it under advisement; Court will take deft's request for a ruling that plts have failed to meet their burden on dues issue; defts evidence. pltf's evidence.
11	64	Defts' motion for leave to supplement the record, filed. c/s
11	65	Transcript of hearing on Friday, Feb. 20, 1981, filed.
11	66	Transcript of hearing on Friday, March 6, 1981 filed.
18	67	Defts' memorandum in support of proposed findings of fact and motion to dismiss amendments to the complaint, filed. c/s
18	68	Memo of law regarding pltfs' amended claims, filed. c/s
19	69	Defts' memo concerning the posting of a bond pursuant to rule 65(c) F.R.C.P., filed. c/s
20	70	Pltfs' motion for leave to supplement the record and supplemental objection to proposed order of the Court, filed.
23	71	Supplemental memorandum of law regarding pltfs' amended claims, filed. c/s

DATE	NR.	PROCEEDINGS
1981		
March 24	72	Defts' memo in opposition to pltfs' motion for leave to suppement the record, filed. c/s
30	73	Transcript of hearing on Thursday, Jan. 15, 1981, filed.
Apr. 20	74	Defts' response to pltfs; motion for 4/8/81 filed, c/s.
30	75	Defts' memorandum in support of their motion to suspend Injunction pending appeal, filed. c/s
May 5	76	Stipulation of the parties regarding language for modified proposed order . . . filed.
8	77	Pltfs' memo in opp to defts' motion to stay inj pending appeal filed.
16	78	Transcript of hearing on 4/23/81 filed.
12/23/80	79	Pltfs' trial memo in support of their motion for injunctive relief regarding the twenty-four month rule
1/23/81	80	Pltfs' motion for supplenetal Preliminary Relief, filed. c/s
2/6/81	81	Letter to Judge Keeton from Mr. Stern, Esq, filed.
2/27/81	82	Copy of letter to Ms. Noonan and Mr. Pressman from Mr. Reilly, filed.
27	83	Defts' proposed modifications to the Court's proposed order, filed.
3/6/81	84	Stipulation of the parties, filed.
6	85	Pltfs' memorandum in opposition to the requirement of posting a bond, filed.

DATE	NR.	PROCEEDINGS
1981		
4/13/81	86	Pltf's motion to modify Feb. 12, 1981 order of the court, filed c/s
4/23/81	87	Letter to Judge Keeton from Mr. Katz, Esq, filed.
July 13	88	*KEETON, D.J.* ORDER dated April 21, 1981, entered. copies to counsel.
14	89	*KEETON, D.J.* Memorandum dated July 13, 1981, entered. cc/cl and opinion book
14	90	*KEETON, D.J.* Preliminary Injunction, dated July 13, 1981, entered. cc/cl and opinion book
July 28	91	Notice of appeal filed by the defts f.f. paid (cc/cl)
Aug. 12	92	Pltffs Notice of Appeal filed. c/s (F.F. not pd.)
17	93	Memorandum and Order received from the Court of Appeals entered . . . . Deft-appellants "Emergency Motion to Suspend, In Part, Injunction Pending Appeal" is denied. Pltffs-appellees motion to extend time for filing notice of appeal is denied.
25		CONFERENCE SET FOR 8/26/81, 3:15 PM; Messrs. Pressman, Whitlen, and Keenan of Honest Ballot Assn. notified by phone; attempted to leave message for Mr. Katz. Mr. Whitlen will participate by phone. (N.B.: Mr. Katz will participate by phone.)
26		*KEETON, D.J.* Conference; Order of 7/13/81 is hereby modified, such that notice will be mailed, in accord. with paragraph 4, by 9/9/81, and all other time limits are adjusted accordingly.

DATE	NR.	PROCEEDINGS
1981		
Aug. 26	94	P's mtn for an Award of Atty's Fees, Filed, c/s.
26	95	re #94 AFFADAVIT of Mark Stern, Filed, c/s.
26	96	re #94 AFFADAVIT of Kurt Pressman, Filed, c/s.
26	97	re #94 AFFADAVIT of Benjamin Hiller, Filed, c/s.
26	98	re #94 AFFADAVIT in support of an award of Atty's fees to Plaintiff, Filed, c/s.
26	99	re #94, MEMO in support of an Award of Atty's fees, Filed, c/s.
26	100	Mtn for an Order by P for def. to give an accounting of fees expended and to give individual def's & union equal shares, Filed, c/s.
31	101	Mandate received from the Court of Appeals entered . . . . motion to withdraw the appeal allowed.
Aug 21	102	Letter to KEETON, D.J. from Kathryn Noonan, dated 21 Aug 81 re: nomination meeting not yet arranged, Filed. cc's to Witlen, Stern, and Griffiths.
Sept 8	103	Def's opposition to P's mtn for an award of Attys fees and mtn to enlarge time to respond to P's mtns, Filed.
Sept 15	104	Letter from Plaintiff's Atty, Filed.
Sept 15	105	Letter re Opinion, Filed by plaintiff's attys.
Sept 14	106	*KEETON, D.J.*: Decision re Plaintiff's mtn for atty's fees, Motion DENIED reason being its untimeliness, ENTERED, cc/cl.

DATE	NR.	PROCEEDINGS
1981		
25	107	Copy of letter to Lawrence Katz, Esq., from Philip V. Piemontese of Local 82, dated 9/21/81, stating his belief that time guidelines for notice of election set in Order of 7/13/81, modified 8/26/81, not being complied with; filed, ref. to KEETON, D.J.
	108	Letter to KEETON, D.J., from Lawrence E. Katz, dated 9/24/81, requesting hearing or conf w/3rd parties and counsel, on validity of procedures followed to date in ref. to #107; filed, ref. to KEETON, D.J.
Oct 14	109	Letter to KEETON, D.J., from Gary S. Witlen, dated 10/9/81, ref. a letter of Mr. Pressman of 10/2/81 re eligibility period, putting forth Local's position; states Ds do not object to formal order approving 38-day notice of nomination; filed.
Oct 2	110	Copy to letter to Lawrence Katz from Philip V. Piemontese, dated 9/25/81, advising that the latter withdraws his objections dated 9/21/81 re scheduling of nomination meeting; filed.
Oct 9	11	Letter from Ms. Noonan to Mr. Katz dated 29 Sept. 81, Filed.
9	112	Letter from Mr. Pressman to Mr. Katz, Dated 2 October 81, Filed.
9	113	Letter from Mr. Katz to Judge Keeton, Filed.
Sept 9	114	Letter form Mr. Katz dated 9 Sept 1981, Filed.
10	115	P's mtn for expedited resolution of mtn for award of attys fees, Filed with MEMO in support, c/s.

DATE	NR.	PROCEEDINGS
1981		
Oct 9	116	Ps' mtn for approval of attachment of real estate of Ds B. Griffith and G. Harris, in amt of $60.000, filed, c/s.
	117	Affid of Kurt M. Pressman in support of #116, filed, c/s.
	118	Affid of Jerome Crowley in support of #116, filed, c/s.
21	119	*KEETON, D.J.* NOTICE OF HEARING ON #116, set for 11/20/81, 12:00 PM, filed, cc/cl.
		Clerk informed by Atty. Pressman that Ps do not contest approval of issues outlined on #109.
Oct 15	120	Letter from Mr. Katz to KEETON, D.J. dated 15 Oct 81, cc/cl.
21	121	Def's opposition to P's mtn for approval of attachment, Filed, c/s.
23	122	*KEETON, D.J.* MEMORANDUM AND ORDER ENTERED: Re request of Arbitrator for rulings: 1. 24-month period for computing membership in good standing, Oct., 1979 thru Sept., 1981, APPROVED;
		2. plan of examining eligibility of nominated candidates within 48 hrs of Nomin. Meeting APPROVED; post-meeting review shall not be based on period that includes Oct., 1981;
		3. Validity of 38 days notice APPROVED; . . . filed, cc/cl.
		Atty. Katz' office notified by phone, 10/23/81.

DATE	NR.	PROCEEDINGS
1981		
Oct 29	123	Letter from Mr. Katz to Ms. Noonan, & Mr. Pressman re Final selection of eligible candidates for election; a total of 15 candidates selected by Mr. Katz from possible 20 candidates, request for notice of challanges to candidates as soon as possible, Filed, cc/cl.
Nov 9	124	Letter to KEETON, D.J., from Lawrence E. Katz, even date, requesting ruling on eligibility of James Miller, w/attachments; filed, ref. to KEETON, D.J.
12	125	*KEETON, D.J.* MEMORANDUM AND ORDER ENTERED: ". . . ORDERED: The Arbitrator's decision that James Miller is eligible to run for Union office is AFFIRMED." Filed, cc/cl.
20		*KEETON, D.J.* HEARING ON #116: discussion of jurisdiction for issuing attachment for satisfaction of attys' fees; Court directs P's counsel to re-examine mtn; if wants to press mtn, will file memo re whether Court has authority to issue attachment for fees not now due and owing. P's memo due in 2 wks: Ds' reply 2 wks thereafter; P may request addit'l time to reply to Ds' submission. P may address issue of whether Ds are sued in individ or offical capacity.
Dec 7	126	Plaintiff's Memo of Law in Support of Mtn for Approval of Attachment, Filed, c/s.
Dec 18	127	Def's opposition to Plaintiff's Mtn for attachment, Filed, c/s.
30		Ref. to KEETON, D.J., #116 and related filings.
		(Clerk advised by Atty. Hiller that P will not reply to D's submission re #116.)

DATE	NR.	PROCEEDINGS
1981		
31	128	Ds' mtn for specific acctg of services rendered by Honest Ballot Assn and for extension of time to respond to arbitrators' request for payment, to 10 days after receipt of info moved for within; filed, c/s.
17	126A	Letter to KEETON, D.J., from Lawrence E. Katz, enclosing bill for services and statement of hours, requesting Court's determination of appropriateness, filed.
Nov 9	124A	Letter to Mr. Katz from Mr. Piemontese re procedure for mailing, Filed.
1982		
Jan 4	127	*KEETON, D.J.*: Memo & Order ENTERED: Plaintiff's motion for the Approval of Attachment is DENIED, cc/cl.
Jan 8	128A	Transcript of proceedings before KEETON, D.J. on 20 Nov 81, Filed.
14	129	Objection of Honest Ballot Assn to #128, and REQUEST FOR EXTENSION to respond to requests for payment of arbitrators, filed, c/s.
15		CONFERENCE ON #128, 129, SET FOR 1/25/82, 3:00 PM; counsel notified by phone; Mr. Witlen may participate by telephone.
25		*KEETON, D.J.* CONFERENCE ON #128: Assn. to make new submission of charges within 1 week; any submissions from P & D in reply due 2/10/82; FURTHER CONFERENCE SET FOR 2/19/82, 1:00 PM; NOT NECESSARY IF PARTIES COME TO AGREEMENT.

DATE	NR.	PROCEEDINGS
1982		
Feb 2	130	Honest Ballot Assn's supplement to statement of 12/16/81
Feb 12	131	Notice of address of Kathryn Noonan, to 27 School St., Filed
12	132	Def's second mtn for specific accounting of services rendered by Honest Ballot and extension of time to respon to request for payment by the "arbitrators" Filed, c/s.
19		*KEETON, D.J.* CONFERENCE on expenses of Honest Ballot Assn: recessed for counsel to confer on form of accounting; Atty. Noonan reports Atty. Keenan will file more specific accounting week of 2/22/82.
Feb 23	133	Transcript of proceedings before KEETON, D.J. on 25 Jan 82, Filed.
April 15	134	Defts' objections to the bills submitted by the "Arbitrators", filed c/s
19	135	Letter to KEETON, D.J., from Paul H.J. Keenan, dated 2/23/82 (rec'd previously in Chambers) attaching Details of Professional and Managerial Hours and Clerical Hours, filed.
	136	Letter to KEETON, D.J., from Lawrence E. Katz, dated 4/8/82 (rec'd previously in Chambers) stating his understanding as to disputed portions, and requesting approval of undisputed portion, filed.
Apr 19		*KEETON, D.J.* NOTICE OF HEARING ON OBJECTIONS TO REQUESTS FOR PAYMENT OF ARBITRATORS AND HONEST BALLOT ASSN., SET FOR 4/29/82, 3:00 PM; filed, cc/cl.

DATE	NR.	PROCEEDINGS
1982		
Apr 29	137	Notice of appearance of Donald J. Wood as Atty for the Honest Ballot Assoc, Filed.
May 7	138	Transcript of proceedings on 4/29/82 before J. Keeton, filed
May 13		Return on service wso Katherine Noonan, Filed.
May 20	139	Transcript of proceedings before KEETON, D.J. on 19 Feb 82, Filed.
21	140	Opinion received from the Court of Appeals entered . . . . affirmed.
May 24	141	Keenan's mtn for Allowance of atty's fees, Filed, c/s.
June 1		FURTHER HEARING SET FOR 6/2/82, 12:00 noon; preliminarily confirmed on 5/28/82; counsel re-confirmed by phone this date.
Apr 29		*KEETON, D.J.* HEARING ON OBJECTIONS TO REQUESTS FOR PAYMENT of (Re . . . . Arbitrators and Honest Ballot Assn (of New England). Evidence by Attys. Katz, Keenan; Atty. Katz excused for remainder of hearing.
June 2		*KEETON, D.J.* FURTHER HEARING ON OBJECTIONS TO REQUESTS FOR PAYMENT (Reptr. Linda MacDonald) Evidence re: Honest Ballot Assn. N.E. (Keenan) continues. Evidence closed. Honest Ballot Assn. N.E. agrees to accept $2400 as compensation plus $40 expenses; Local 82 agrees to pay $2440 to Assn. No compensation for Atty's fees for Mr. Keenan. Court finds that $4934.96 is reasonable compensation for services and expenses for

DATE	NR.	PROCEEDINGS
1982		
		Lawrence Katz. Local 82 ordered to pay this amt. Local 82 ordered to pay both H.B. Assn. of N.E. and L. Katz within 30 days.
Sept 1	142	*KEETON, D.J.* NOTICE OF CONFERENCE on renewed consideration of #94, Ps' mtn for attys' fees, ON 9/30/82, 4:00 PM; filed, cc/cl.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

GENERAL DOCKET

[Case Title Omitted in Printing]

DATE	FILINGS—PROCEEDINGS
1981	
July 30	Copy of Notice of Appeal and Docket Entries received and filed and Case docketed. Notices mailed. (laa).
Aug 5	Emergency Motion to Suspend in Part, Injunction Pending Appeal filed. Brief in Support of Defendants-Appellants' Application for Partial Stay filed. (laa).
Aug 6	Appearances of Mark Stern, Benjamin Hiller and Ken Pressman, Esquires for Plaintiffs, Appellees filed. (laa).
Aug 6	Appearance of Gary S. Witlen, Esq., for Defendants, Appellants received and filed. (laa).
Aug. 7	Appearance of Kathryn M. Noonan, Esq., for Defendants, Appellants received and filed. (laa). Appellants' Jurisdictional Statement filed. (laa).
Aug. 10	Plaintiffs-Appellees' Motion to Extend Time for Filing Notice of Appeal filed, Plaintiffs-Appellees' Opposition to Defendants-Appellants' Emergency Motion to Suspend in Part, Injunction Pending Appeal received and filed. (laa).
Aug. 12	Plaintiffs-Appellees' Memorandum in Opposition Defendants-Appellants' Application for Stay received and filed. (ar)
Aug. 17	Memo & Order (Bownes, J) denying appellants' "Emergency Motion to Suspend, In Part, Injunction Pending Appeal"; denying appellees' motion to extend time for filing notice of appeal, see Fed. R. App. P. 4(a)(5). Notices mailed. (jmv)

DATE	FILINGS—PROCEEDINGS
1981	
Aug. 21	Record on appeal in one volume, received & filed. Notices mailed. (mn)
Sept. 1	Defendants-Appellants' Designation of Appendix Entries and Issues received and filed. (laa).
Sept. 14	Plaintiffs-Appellees' Designation of Appendix Entries received and filed. (laa).
Sept. 25	Brief for the appellants and four volumes of the appendix, received and filed. Notices mailed. (mn)
Oct. 7	Motion filed. Order (Campbell, J.) enlarging time for Appellees to file thier brief up to and including October 30, 1981. Notices mailed. (laa).
Oct. 30	Brief for Plaintiffs, Appellees received and filed. (laa).
Nov. 10	Motion filed. Order (Coffin, Ch.J.) enlarging time for filing the reply brief for appellants to and including November 13, 1981. Notices mailed. [lam]
Nov. 13	Reply Brief for Defendants, Appellants received and filed. (laa).
Dec. 24	"Motion of the Secretary of Labor to Intervene" received and filed. (jd)
Dec. 28	Order (Bownes, J.) granting leave to Raymond J. Don van, Secretary of Labor, to intervene herein; and said intervenor is granted 10 minutes for oral argument. Notices mailed. (mn) Brief for the intervenor, received and filed, appearance of Susan M. Webman, for Intervenor, received and filed. (mn)
Dec. 29	Assigned for hearing at the January, 1982, session. (cb)

DATE	FILINGS—PROCEEDINGS
1981	
Dec. 30	"Plaintiffs' Opposition to Motion of Secretary of Labor to Intervene" filed.
Dec. 30	Order (Bownes, J.) treating opposition of appellees as a motion for reconsideration and denying the same; and counsel may request leave at the end of oral argument to file a short memorandum in response to the amicus if they feel such memorandum is needed. Notices mailed. [lam]
1982	
Jan. 6	Heard by Coffin, Campbell & Bownes, J.J. [lam]
Jan. 12	Appearance of Susan Webman for the intervenor filed. (jd)
Jan. 15	Motion filed. Order (Breyer, J.) granting leave to plaintiffs, appellees to file a brief in response to the arguments presented in the Secretary of Labor's brief, instanter. Notices mailed. (mn) Plaintiffs/appellees' brief in response, received and filed. (mn)
May 21	Judgment: The order of the District Court is affirmed. Opinion of the Court by Bownes, J., dissenting opinion by Campbell, J. Notices mailed. [lam]
May 27	Itemized and verified bill of costs received and filed. Notices mailed. (cb)
June 1	Defendants-appellants' objection to plaintiffs-appellees' bill of costs received and filed. (lam)
June 3	Order (Bownes, J.) Upon consideration of appellants' objection to appellees' bill of costs it is ordered as follows: Costs in favor of the plaintiffs/appellees and against appellants are taxed at $148.20; and Costs in favor of plaintiffs/appellees and against The Secretary of Labor are taxed at $217.35. Notices mailed. (mn)

DATE	FILINGS—PROCEEDINGS
1982	
June 4	Motion filed. Order (Coffin, Ch.J.) enlarging the time for appellant to file a Petition for Rehearing and A Suggestion for Rehearing en Banc to and including June 7, 1982. Notices mailed. (mn)
June 4	Petition for rehearing and rehearing en banc (filed at 8:15 p.m.) received and filed. (mn)
June 10	The Secretary of Labor's Objection to Plaintiffs-Appellees' bill of costs, filed. (as)
June 11	Order (Bownes, J) Upon consideration of the Secretary's objection to plaintiffs/appellees' bill of costs, dated June 9, 1982; It is ordered that said objection is hereby overruled for reasons stated in said order. Notices mailed. (mn)
June 15	ORDER: (Coffin, Ch.J., Campbell, Bownes & Breyer, JJ.) the petition for rehearing and the suggestion for rehearing en banc filed on June 4, 1982, are hereby denied. Notices mailed. (mn)
June 22	Mandate issued, copy filed, original papers to follow. Notices mailed. (as)
Sept. 20	Notice of filing petition for certiorari [#82-432], filed. (mn)
1983	
Jan. 26	Notice from the Supreme Court granting certiorari, [82-432/1/24/83], received and filed. (mn)

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-432

LOCAL NO. 82, FURNITURE AND PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN, AND PACKERS; BART GRIFFITHS, SECRETARY-TREASURER, LOCAL NO. 82; GEORGE HARRIS, PRESIDENT, LOCAL 82; PHILLIP PIEMONTESE, CHAIRMAN OF THE ELECTION COMMITTEE OF LOCAL NO. 82; and JOHN DOE, JAMES DOE and JEROME DOE, MEMBERS OF THE ELECTION COMMITTEE OF LOCAL NO. 82,
Petitioners,

RAYMOND DONOVAN, SECRETARY OF LABOR,
Intervenor,

v.

JEROME CROWLEY, ANTHONY COYNE, JOSEPH FAHEY, ROBERT LUNNIN, JAMES HAYES, GERALD OWENS, JOHN LYNCH, JOSEPH TRASK, JOSEPH MONTAGNA, and DENNIS BATES,
Respondents.

OPINIONS BELOW

The opinion of the District Court for the District of Massachusetts is reported at 521 F. Supp. 614, and is reprinted in Appendix A of the Petition for Writ of Certiorari filed September 13, 1982. The opinion of the United States Court of Appeals for the First Circuit is reported at 679 F.2d 978, and is reprinted in Appendix B of the Petition. The Judgment of the Court of Appeals is printed in Appendix C of the Petition and that Court's Order Denying Request for Rehearing is printed in Appendix D of the Petition.

The District Court's Temporary Restraining Order Issued December 12, 1980, is printed in Appendix F of the Petition.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Case Title Omitted in Printing]

COMPLAINT

1. This is an action brought under Article 29 U.S.C. s. 411 *et seq.* by union members, severally and on behalf of two (2) classes of union members, against their union officers, who have violated and continue to violate Plaintiffs' equal rights to attend union meetings, nominate candidates for election, and freely express their opinions.

2. The Plaintiffs seek preliminary relief requiring the reopening of nominations for their upcoming union election, declaratory relief, and damages.

JURISDICTION

3. Jurisdiction of this Court is claimed under 29 U.S.C. 412 and 28 U.S.C. 1331 and 1337.

PARTIES

Individual Plaintiffs

4. The Plaintiffs Jerome Crowley, Anthony Coyne, Joseph Fahey, James Hayes, Robert Lunnin, John Lynch, Gerald Owens, Joseph Trask and Joseph Montana are members of Teamster Local No. 82, Furniture and Piano Moving, Furniture Store Drivers, Helpers, Warehousemen, and Packers, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as Local 82). They are all citizens of Massachusetts and of the United States.

5. All of the Plaintiffs are employees of one of approximately 14 companies in the Boston area which have negotiated collective bargaining agreements with Local 82.

6. Plaintiffs Lunnin, Hayes and Trask are "spares"—i.e., they work as needed by one or more employers and are not assured full-time or steady employment. Approximately one-third of the members of Local 82 are spares. The other Plaintiffs are "regulars": i.e., they have permanent, full-time positions with their respective employers.

7. All the Plaintiffs seek to nominate a candidate and/or be nominated as a candidate in the impending election of officers of Local 82.

Class Plaintiffs

8. All the Plaintiffs are so situated as to be representative of all members of their union local in good standing. The Plaintiffs Lunnin, Hayes and Trask are also so situated as to be representative of all the members in good standing of their union who are employed as "spares."

9. The Plaintiffs' interests are such that they will fairly and adequately protect the interests of all such members, and claims are typical of the claims of all such members, and the classes of all such members are so numerous that joinder of all such members is impractical.

10. Plaintiffs seek to raise by their claims herein questions of law and fact common to all such members, which common questions of law and fact predominate over any questions affecting only the individual Plaintiffs; hence a class action is superior to other available methods for the fair and efficient adjudication of the claims raised herein.

Defendants

11. Defendant Local 82 is a labor organization whose principal office is in Quincy, Massachusetts.

12. Bart Griffith is the Secretary-Treasurer of Local 82. Defendant George Harris is the President of Local 82. Phillip Piemontese is the Chairman of the Election

Committee of Local 82, and John Doe, James Doe and Jerome Doe are the members of said Election Committee. The Defendants are individually and collectively responsible for the conducting of meetings and elections of officers within Local 82. They are residents of the Commonwealth of Massachusetts and the United States.

FACTS

13. Defendant Local 82 has a membership of approximately seven hundred and fifty (750) persons. Its operations at all relevant times have been governed by the Constitution of the International Union (hereinafter referred to as "the Constitution") and the "Constitution and Bylaws" of Local 82 (hereinafter referred to as "the Bylaws"), true and accurate copies of relevant portions of which are appended as Exhibits A and B hereto.

14. The Defendant Union and its International have for many years been run in a fashion that restricted, discouraged and suppressed democratic participation by their individual members, and democratic opposition to incumbent union officers in elections and dissent within the local.

When, in the past, Defendants or the International have engaged in actions to suppress democracy and/or dissent in the union, there has followed as a direct result of said actions fear and/or discouragement among the membership of further engaging in democratic activity and/or dissent in the union. In particular there has arisen the fear that the officers and/or Executive Board will take away from members engaging in such activities their ability to continue to earn a livelihood, which ability is dependant on their membership-in-good-standing in the union.

15. The Plaintiffs are all members in good standing of Local 82. None of them are officers of said union.

16. The Plaintiffs and other members of Local 82 have in recent years individually sought to encourage union members to attend meetings of Local 82, express their views therein, and to participate more actively in the deliberations and voting upon business in the union. They have themselves regularly attended union meetings for these purposes and attempted to fully and actively participate in the business affairs of the union at these meetings.

17. At said meetings and on other occasions Plaintiffs have actively expressed their views, opinions and criticisms regarding the business, management and leadership of the Local 82 and its officers. In 1979 and 1980 the Plaintiffs openly criticized the incumbent officers:

(a) for failing and refusing to provide new members with the Constitution and Bylaws of the union and failing to make them available to other members;

(b) for unlawfully raising dues on one occasion without even attempting to obtain membership approval thereof;

(c) for attempting to raise dues on another occasion to pay for the creation of a patronage position in the union;

(d) for calling an unnecessary strike against an employer; and

(e) for failing to provide members with accurate and complete information, in particular information about the loss of benefits thereunder to "spares," about a contract presented to them for ratification.

18. The aforementioned conduct of Plaintiffs and other members of Local 82 has continued to November, 1980. At all relevant times the Defendants have been aware of and opposed to the Plaintiffs' aforementioned activities.

19. On or about November 9, 1980, the officers of Local 82 held a membership meeting, one of the purposes of which was to nominate candidates for the union's De-

cember election of its Executive Board members, who consist of President, Vice-President, Secretary-Treasurer, Recording Secretary, and three Trustees.

20. For several months prior to this nominating meeting, the Plaintiffs and their supporters had planned to attend said meeting and nominate a slate of candidates to oppose the incumbent officers who are seeking re-election.

21. In violation of Article VI, Sec. 2 of the Bylaws, Exhibit B hereto, the Defendants failed to give notice by mail or by publication in a local union publication mailed to all members, as required by the Bylaws, at least twenty (20) days prior to the date of the nominating meeting of its specific date, time and place and of the offices to be filled. Indeed the Defendants failed to give most members and even most stewards any reasonable advance notice whatsoever of the nominating meeting. Only at a few of the union members' workplaces was any notice of said meeting posted, and it was posted at those few places only four to six (4-6) days prior to the meeting, thereby giving most spares no effective notice at all.

22. As a result of the lack of notice, the nominations meeting was sparsely known of and/or sparsely attended, some of the Plaintiffs and other union members in good standing were thereby unable to attend said meeting and nominate eligible candidates of their own choosing for office, and others were denied their right to nominate them for union office, all of which the Plaintiffs or others desired to do and otherwise would have done.

23. Some Plaintiffs and other union members were discouraged from attending said meeting because Defendants falsely led them to believe they could not nominate or vote for officers, or be nominated for office unless they had attended fifty per cent (50%) of all prior union meetings within the last 24 months, as is stated in the Constitution, Exhibit A, Art. II, s. 4, and the Bylaws, Art. VI, s. 3(b).

24. Prior to the November 9, 1980 union meeting, the expressed policy and practice of the union regarding admittance into union meetings was either that every member had to show his dues receipt indicating payment of dues for that month; or that the member must pay his union dues at the door of the meeting. More often in practice members were admitted to meetings without either showing dues receipts or paying at the door. As recently as the October, 1980 union meeting, a number of members, including Plaintiff Lunnin, were permitted to attend the meeting after payment of their dues at the door.

25. At the November 9, 1980 meeting, Plaintiff Jerome Crowley and eleven other supporters of the Plaintiffs were refused admittance to the meeting by the Defendants, purportedly because they did not have their October, 1980 dues receipts. The Defendants refused to allow any of the twelve to pay their dues at the door. The defendants refused to permit Plaintiff Crowley to enter the meeting even though Defendants Griffith and Harris had computer print-out sheets in their possession at the time showing that Crowley was fully paid up in his dues.

26. Had Plaintiff Crowley and/or the others been allowed into the meeting, they would have nominated several of the Plaintiffs or their fellow dissidents to union office.

27. The failure of the union to abide by its past practice discriminated in particular against spares who are not and cannot be on checkoff, must pay their dues independently, and had in the past relied upon the practice of paying their dues at the door to gain entrance to union meetings.

28. At the opening of the November 9, 1980 meeting, Defendant Griffith read a list of approximately eight members, including Plaintiffs Lunnin, Hayes and Coyne, who were ineligible to be candidates for office due to their

failure to comply strictly with the union's twenty-four (24) month rule. Said rule which is stated in the Constitution, Art. II, s. 4, and Bylaws, Art. IV, s. 3(b), Exhibits A and B hereto, bars members who have not paid their dues in full and on time in every month of the twenty-four (24) months preceding an election from running for elective office.

29. It was known by the Defendants to be unlawful to apply said rule without reasonable granting of grace periods; nonetheless they applied it strictly to the Plaintiffs and others desiring to run against them for union office. At least several hundred other members of the union were automatically disqualified from running for office against the incumbents by the strict application of this rule, yet only eight persons' names were read off at the meeting. Each of these eight persons were members who regularly attended meetings and have consistently opposed the incument union leadership. One of said persons, the Plantiff Coyne, was disqualified under this rule in spite of the fact that he had only paid his dues late once in the preceding 24 months and on that occasion was only five (5) days late in making his payment. This fact was known to the Defendants at the time they disqualified him because, as described in paragraph 24 heretofore, they had a printout of his dues payments in their possession at the time. A true and accurate copy of said printout is appended hereto as Exhibit C.

30. In the past union election in 1977, when there was no organized opposition to the Defendants, the 24 month rule was not strictly enforced as a prerequisite for eligibility to run for office; hence one candidate in said election was permitted to run for office in spite of the fact that he had an imperfect record of timely dues payment for the preceding 24 month time period.

31. Plaintiffs Crowley, Lunnin, Owens, Coyne and Hayes would have run for union office against the incumbent Defendant officers if they had not been locked out of

the union meeting and/or declared ineligible for their failure to comply with the 24 month rule.

32. After reading off the list of eight (8) ineligible members, Defendant Griffiths read off a list of only twelve (12) members who he said were eligible to run for union office. Of these twelve, seven (7) were incumbent officers, four (4) were their close supporters, and one (1) was Plaintiff John Lynch. Though many more than twelve (12) members were eligible for office, Defendant Griffiths read off a list of only twelve (12) eligible candidates and thereby falsely led Plaintiffs and other union members in attendance at the meeting to believe that they could not nominate other eligible candidates of their choosing.

33. When the floor was opened for nominations at the November 9, 1980 meeting, Plaintiff Robert Lunnin announced his nomination of Plaintiff John Lynch, the only named eligible candidate who was not an incumbent or one of their close supporters, to the office of Secretary-Treasurer, the most important office in the union. The Recording Secretary recorded Lynch instead as having been nominated for President. When, later during the nominations, this action was made known, Plantiff Lunnin requested that the error be rectified. Defendant Bart Griffith, incumbent Secretary-Treasurer, rejected this request, replying, "I'm running unopposed."

34. During the meeting, Plaintiff Lynch nominated Plaintiff Gerald Owens for office in the union. Although this nomination was accepted at the time, Plaintiff Owens was declared ineligible two days later due to his noncompliance with the "twenty-four (24) month rule." One of the incumbents' selections for union office was also later determined to be ineligible under this rule. The incumbents substituted on the ballot later prepared the name of another person they wanted to run for that office, without notice to the members. No comparable opportunity was granted to Plaintiffs or other members of the union with

regard to the nomination and disqualification of Gerald Owens. Hence at the present time the incumbent officers and their close supporters are running without opposition, except for the office of President, for which John Lynch is also listed as a candidate on the ballot.

35. The Defendants aforementioned actions and in particular their enforcement of the "twenty-four month rule" in the current election was in response to the rise of opposition within the union and was intended to prevent other union members, and in particular members of the opposition group, from being nominated for union office.

36. On or about November 10, 1980, Plaintiffs Crowley, Lynch, Lunnin, Owens and Hayes sent a letter to the Defendant Griffiths, the Executive Board of Local 82, Joint Council 10 of the International Union, of which Local 82 is a member, and the General President of the International Union appealing and challenging the nominating process and the application of the "twenty-four month rule." Said letters were sent pursuant to the procedures described in Article XXII, s. 5 of the Constitution, Exhibit A hereto.

37. Immediately after delivery of the aforementioned notice/letter of appeal to the Local Union's offices, the Defendant Griffiths charged the Plaintiff Robert Lunnin with several violations of his obligations as a member of the Defendant Union solely on account of and in reprisal for his lawful protestations against the aforementioned actions of the Defendants of November 9, 1980. A copy of the charges are appended hereto as Exhibit D.

38. On or about November 25, 1980 a trial was held on the aforementioned charges before four members of the Executive Board of Local 82. If the Plaintiff Lunnin is found guilty of the charges, he may lose his good-standing membership in Local 82 and thereby lose his ability to earn his livelihood.

39. The aforementioned discipline of the Plaintiff Lunnin was conducted in violation of his rights and the rules of the union in that: (a) he was not served with specific written charges; and (b) not afforded a hearing before disinterested persons appointed as substitutes for the charging party members of the Executive Board as is required by Article XIII of the Bylaws, Exhibit B hereto.

40. The Plaintiffs have to date received no response from the Defendants on their objections to the nomination processes in their union and no determination regarding the hearing held on charges brought against the Plaintiff Lunnin.

41. The Local 82 elections are scheduled to be held on or about December 13, 1980. If said elections are held without an opportunity being afforded to reopen nominations in accordance with applicable law and the Constitution and Bylaws of Local 82 and if said elections are held while false and frivolous charges are pending against the plaintiff Lunnin, which charges threaten his membership-in-good standing in the union and ability to earn his livelihood, the holding of said elections and the consequent election of unopposed officers as a result thereof will serve to chill and suppress any future exercise of rights guaranteed to them by Plaintiffs and other members of Local 82.

42. The Plaintiffs have no adequate remedy other than this action. Any further attempt to exhaust administrative remedies would be futile because the exhaustion of said remedies in the local union would be before judges who are not disinterested and because the exhaustion of said remedies in the International Union against incumbent officers of local unions has been historically proved to be of no avail.

CLAIMS

43. Defendants' failure to send all members written notice of the nominating meeting twenty days in advance, as required by Article VI, s. 2 of the Bylaws and

their posting of such notice in only some workplaces and then only 4 to 6 days before the meeting denied Plaintiffs and the Plaintiff classes (1) the equal right to attend said meeting, and (2) the equal right to nominate candidates, each in violation of 29 U.S.C. s. 411(A)(1).

44. Defendants' refusal to permit Plaintiff Crowley and eleven others to attend the November 9 membership meeting denied them their equal rights to attend membership meetings, in violation of 29 U.S.C. s. 411(a)(1).

45. Defendants' refusal to permit Plaintiff Crowley and eleven others to attend the November 9 membership meeting was in reprisal for Plaintiff Crowley and others expressing differing views than those held by the Defendants regarding union business and constituted an attempt to deny them their right to freely express their views about the upcoming election and other matters affecting the membership in violation of 29 U.S.C. s. 411 (a)(2).

46. Defendants' unlawful refusal to permit Plaintiff Crowley and eleven others to attend the November 9 nominations meeting resulted in their being denied their equal right to nominate candidates for office, a right they intended to exercise fully, in violation of 29 U.S.C. s. 411 (a)(1).

47. The Defendants' announcement of the names of only twelve members eligible for office, all but one of whom were either incumbent officers or their close supporters, constituted a denial of the equal right of the Plaintiffs to nominate candidates of their choice to union office, in violation of 29 U.S.C. s. 411(a)(1).

48. Defendants' refusal to allow Plaintiff Robert Lunnin to nominate Plaintiff John Lynch to the position of Secretary-Treasurer constituted a denial of Plaintiff Lunnin's equal right to nominate eligible candidates in violation of 29 U.S.C. s. 411(a)(1).

49 The Defendants' strict application of the "twenty-four month" rule denied Plaintiffs their equal right to

nominate candidates and constituted an unreasonable and discriminatory restriction on nominations and eligibility for union candidacy, in violation of 29 U.S.C. s. 481(e).

50. The Defendants' strict application of the "twenty-four month rule" constituted an unlawful retaliation for Plaintiffs' expression of their views within the union, in violation of 29 U.S.C. s. 411 (a) (2).

51. The Defendants' discipline of the Plaintiff Lunnin constitutes unlawful reprisal against said Plaintiff for his exercise of rights guaranteed by 29 U.S.C. s. 411(a) (2).

52. The Defendants' discipline of the Plaintiff Lunnin constitutes unlawful discipline in violation of 29 U.S.C. s. 411(a) (5).

PRAYERS FOR RELIEF

WHEREFORE PLAINTIFFS PRAY THIS HONORABLE COURT:

1. Issue a short order of notice for the Defendants to appear and show cause why Plaintiffs' Motion for a Preliminary Injunction should not be allowed.

2. Grant Plaintiffs' Motion for a Preliminary Injunction.

3. Declare the aforementioned conduct of the Defendants to be unlawful and in violation of the specific, aforementioned laws.

4 Issue a permanent injunction in accordance with the terms of Plaintiffs' Motion for a Preliminary Injunction or such revised terms as proposed at a later date to the Court.

5. Award the Plaintiffs damages in amount of $15,000.00.

6. Award the Plaintiffs costs including reasonable attorneys fee.

7. Order such other relief as justice requires.

By their counsel,

/s/ Kurt Pressman

/s/ Mark Stern

/s/ Benjamin Hiller

KURT PRESSMAN
MARK STERN
BENJAMIN HILLER
GOLDSTEIN, PRESSMAN AND STERN
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617-492-2211

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Case Title Omitted in Printing]

MOTION FOR PRELIMINARY INJUNCTION

Now come the Plaintiffs in the above entitled action and move that this Honorable Court make the following findings, declarations and orders of preliminary injunctive relief:

1. The Court finds that the Plaintiffs have a likelihood of prevailing on the merits of their claims that:

(a) Defendants' failure to send all members written notice of the nominating meeting twenty days in advance, as required by Article VI, s. 2 of the Bylaws and their posting of such notice in only some workplaces and then only 4 to 6 days before the meeting denied Plaintiffs and the Plaintiff classes (1) the equal right to attend said meeting, and (2) the equal right to nominate candidates, each in violation of 29 U.S.C. s. 411 (A) (1).

(b) Defendants' refusal to permit Plaintiff Crowley and eleven others to attend the November 9 membership meeting denied them their equal right to attend membership meetings, in violation of 29 U.S.C. s. 411 (a) (1).

(c) Defendants' refusal to permit Plaintiff Crowley and eleven others to attend the November 9 membership meeting was in reprisal for Plaintiff Crowley and others expressing differing views than those held by the Defendants regarding union business and constituted an attempt to deny them their right to freely express their views about the upcoming election and other matters affecting the membership in violation of 29 U.S.C. s. 411 (a) (2).

(d) Defendants' unlawful refusal to permit Plaintiff Crowley and eleven others to attend the November 9 nominations meeting resulted in their being denied their equal right to nominate candidates for office, a right they intended to exercise fully, in violation of 29 U.S.C. s. 411 (a) (1).

(e) The Defendants' announcement of the names of only twelve members eligible for office, all but one of whom were either incumbent officers or their close supporters, constituted a denial of the equal right of the Plaintiffs to nominate candidates of their choice to union office, in violation of 29 U.S.C. s 411 (a) (1).

(f) Defendants' refusal to allow Plaintiff Robert Lunnin to nominate Plaintiff John Lynch to the position of Secretary-Treasurer constituted a denial of Plaintiff Lunnin's equal right to nominate eligible candidates in violation of 29 U.S.C. s. 411 (a) (1).

(g) The Defendants' strict application of the "twenty-four month" rule denied Plaintiffs their equal right to nominate candidates and constituted an unreasonable and discriminatory restriction on nominations and eligibility for union candidacy, in violation of 29 U.S.C. s. 481 (e).

(h) The Defendants' strict application of the "twenty-four month rule" constituted an unlawful retaliation for Plaintiffs' expression of their views within the union, in violation of 29 U.S.C. s. 411 (a) (2).

(i) The Defendants' discipline of the Plaintiff Lunnin constitutes unlawful reprisal against said Plaintiff for his exercise of rights guaranteed by 29 U.S.C. s. 411 (a) (2).

(j) The Defendants' discipline of the Plaintiff Lunnin constitutes unlawful discipline in violation of 29 U.S.C. s. 411 (a) (5).

2. The Court further finds that the Plaintiffs will suffer immediate and irreparable harm unless said violations are redressed as ordered below.

3. Wherefore the Court orders that the declaration of the election of unopposed nominees for office in Local 82 and the swearing in of said officers are null and void.

4. And the Court further orders the Defendants to collect, but refrain from opening or examining any mail-in ballots received from members of Local 82; and to destroy said ballots and otherwise cease and desist from conducting the election of officers in Local 82 except in a manner consistent with all the provisions of this order.

5. And the Court further orders the Defendants to reopen nominations for officers in Local 82 and schedule and hold a membership meeting in December, 1980 for the purpose of nominating candidates for said offices.

6. And the Court further orders the Defendants to give notice to all its members of the holding of a meeting for nominating candidates for office in Local 82 in accordance with applicable law, and the requirements of the Constitution and Bylaws of the Union.

7. And the Court further orders the Defendants to include in the notice of said meeting for nominating candidates for office the following statements:

(a) No member of the union in good standing shall be disqualified from attending said meeting, nominating members in good standing of their selection, voicing their opinions and/or running for union office on account of the fact that they are employed as spares;

(b) No member of the union in good standing shall be disqualified from attending said meeting, nominating members in good standing of their selection, voicing their opinions and/or running for union office on account of the fact that they have failed to attend

50% of the membership meetings of the local union during the past 24 months time;

(c) No member of the union in good standing shall be disqualified from attending said meeting, nominating members in good standing of their selection, voicing their opinions and/or running for union office on account of the fact that they have failed to pay their dues in the month due for each of the past 24 months time unless they have so failed to pay their dues in a timely fashion for an aggregate total of 8 instances or 8 months during said period of time; and

(d) No member of the union in good standing shall be disqualified from attending said meeting, nominating members in good standing of their selection, voicing their opinions and/or running for union office on account of the fact that they have failed to bring evidence with them that they have paid their dues in full to the current month; and any member who desires to bring his/her dues up to date by making payment at the door of the meeting shall be permitted to enter and exercise their rights at such meeting.

8. And the Court further orders the Defendants to conduct the meeting for nominating candidates for union office in accordance with the provisions of the notice set forth in 7 (a), (b), (c) and (d) above.

9. And the Court further orders the Defendants to refrain from any further prosecution of pending charges against Robert Lunnin and to cease and desist from imposing any discipline on Robert Lunnin or any other member of Local 82 except after providing said member with written specific charges and conducting a hearing in accordance with its Constittuion and Bylaws before an impartial body.

10. And the Court orders the Defendants to cease and desist from any and all actions which discriminate or retaliate against the members of Local 82 on account of

their having exercised their rights to (a) express their views about the upcoming election of union officers and other matters of concern to union members; (b) nominate candidates for union office or support such nominees' election to union office; and/or (c) run for office in said union.

By their counsel,

/s/ Kurt Pressman

/s/ Mark Stern

/s/ Benjamin Hiller

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Case Title Omitted In Printing]

MEMORANDUM

December 12, 1980

This case arises out of a dispute concerning a meeting of the membership of Local No. 82 ("Local 82") on November 9, 1980, at which the nomination of candidates for the Local's Executive Board was conducted. The Local's election is to be completed December 13, 1980. Plaintiffs, nine members of Local 82, have brought this action on behalf of themselves and two classes of Local members against the Local, two of its current officers, and the chairman and members of its Election Committee, alleging that the defendants violated Title I of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411 *et seq.* ("LMRDA" or "the Act"), by, *inter alia*, denying plaintiffs their rights to attend union meetings and nominate candidates on an equal basis with other Local members, and to speak freely on matters relating to union business without reprisal. This matter is before the court on plaintiffs' Modified Motion for a Preliminary Injunction reopening the nominations for the Executive Board, preventing defendants from declaring winners of the election, and revoking disciplinary penalties imposed on one of the plaintiffs. Defendants argued that because the conduct at issue bears upon the procedures for conducting union elections, plaintiffs' exclusive remedy is to file a complaint with the Secretary of Labor under Title IV of the LMRDA, and that section 403 of the Act, 29 U.S.C. § 483, and the Supreme Court's decision in *Calhoon* v. *Harvey*, 379 U.S. 134 (1964), denies this court jurisdiction over this action.

I.

FACTS

For the purposes of determining whether this court has jurisdiction and authority to grant temporary relief, we examine the complaint, memorandum, proposed findings, and affidavits filed by the plaintiff to determine whether they establish a prima facie violation of Title I of the Act. *See McNail* v. *Amalgamated Meat Cutters*, 549 F.2d 538, 540 (8th Cir. 1977).

In essence, plaintiffs' materials, if uncontroverted by the defendants, would establish the following:

Plaintiffs are members in good standing of Local 82 who have been openly critical of its incumbent officers and have encouraged other members to attend meetings of the Local and participate actively in union meetings of the Local and participate actively in union affairs. Each of the plaintiffs seek to nominate and/or to serve as a member of the Executive Board of Local 82. On November 9, 1980, Local 82 held a membership meeting to nominate candidates to run in the Local's December election of the Executive Board, *i.e.*, its President, Vice-President, Secretary-Treasurer, Recording Secretary, and three Trustees. Although required to do so by article VI, section 2 of its Bylaws, defendants failed to give Local 82 members 20 days notice of the meeting by mail or publication in a widely-circulated local union publication. Defendants failed to give many Local members any notice of the meeting. They posted notices only at a few of the Local members' workplace less than one week before the meeting. No notice was posted at several workplaces at which a substantial number of Local members worked. As a result of the defendants' failure to give adequate notice, many Local members did not know of the meeting and were therefore unable to attend.

Before the November 9, 1980 meeting, the practice at Local 82 had been to admit to Local meetings all members

who had either a receipt indicating payment of union dues for that month or who paid at the door of the meeting. Often, in practice, Local members were admitted to meetings without showing either dues receipts or paying at the door. On November 9, 1980, plaintiff Jerome Crowley and other Local members attempted to attend the nominations meeting but were denied entrance by one of the defendants because they did not have a dues receipt. At that time, defendants had in their possession a computer printout showing Crowley was current in his dues. (Crowley was later allowed into the meeting after nominations had closed.) Crowley intended to run for Local office and nominate others for Local officers. Plaintiffs allege that the defendants' failure to allow Crowley and the others to attend the nominating meeting was part of a pattern of conduct aimed at suppressing dissident views in the Local.

At the meeting, the defendants declared that Local members who had not paid their dues in full and on time in every month of the preceding twenty-four months were ineligible for office. Article VI, section 3(b) of the Local's Bylaws allow only members who have paid their dues on time for twenty-four consecutive months to run for elective office. Although several hundred Local 82 members were disqualified by the rule, defendants read only a list of eight members declared ineligible. Each of the eight had been outspokenly critical of the incumbents; three of them are named plaintiffs in this action. One of the defendants then read a list of 12 members deemed eligible for Local office. Of the twelve, only one, plaintiff John Lynch, was not an incumbent officer or one of their close supporters. Although others, including one of the plaintiffs, were eligible for Local office under the twenty-four month rule, no other names were listed. The plaintiffs allege that defendants refrained from doing so in order to lead those attending the meeting to believe that only those listed were eligible.

Later at the meeting, plaintiff Lunnen nominated plaintiff John Lynch for Secretary-Treasurer, the most important office in the Local. The Recording Secretary recorded Lynch as having been nominated for Local President. When this action was made known, Lunnen requested that the error be rectified. Defendant Griffith, incumbent Secretary-Treasurer refused, replying, "I'm running unopposed."

Plaintiffs' materials raise several other claims. They allege that defendants denied them the opportunity, after the nominating meeting, to substitute eligible candidates for candidates ruled ineligible under the 24 month rule, an opportunity afforded to supporters of the incumbents. In addition, plaintiff Robert Lunnen alleges that because of his outspoken criticism of the incumbents, and his filing of a notice of appeal to the Executive Board of the Local challenging the nominating procedures used at the November 9, 1980 meeting, he was charged with misconduct by one of the defendants. A trial was held at which three of the four Executive Board members presiding were later charged as defendants in this action. Lunnen never received specific notice of the nature of the misconduct at issue. After a closed hearing, Lunnen was given what plaintiffs described as an unusually severe penalty, a $150.00 fine and a two year suspension from union meetings. Plaintiffs allege that the harsh penalty was actually imposed for Lunnen's exercise of his right to criticize the unions.

II.

JURISDICTION

Defendants argue that because this action arises out of a dispute concerning a union election, plaintiffs' exclusive remedy is to file a complaint with the Secretary of Labor for relief under Title IV of the LMRDA, 29 U.S.C. § 481 *et seq.* They contend that section 403 of the Act, 29 U.S.C. § 483, prevents this court from taking jurisdiction over

any suit under Title I of the Act raising claims that might also be characterized as Title IV claims.

Section 101 of the Act, 29 U.S.C. § 411, establishes a Bill of Rights for union members. Section 101(a)(1) grants

> [e]very member of a labor organization . . . equal rights and privileges . . . to nominate candidates, to vote in elections or referendums . . . , to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

29 U.S.C. § 411(a)(1). Similarly, section 101(a)(2) grants every union member

> the right to meet and assemble freely with other members; to express any views . . . , and to express at meetings . . . his views upon candidates in an election . . . or upon any business properly before the meeting, subject to the organization's established and measureable rules pertaining to the conduct of meetings . . . .

29 U.S.C. § 411(a)(2). Section 101(a)(5) of the Act grants each member procedural safeguards against improper disciplinary action.

In *Calhoon* v. *Harvey*, *supra*, the plaintiffs challenged a seamen's union rule that a member could be eligible for nomination or election only if he had been a member for five years and had served 180 days or more of seatime in each of the two preceding years aboard qualified vessels. The Supreme Court affirmed the district court's dismissal of the suit for want of jurisdiction, holding that the plaintiffs had failed to state a claim under section 101(a)(1), and that plaintiffs could not rely on a Title IV violation to establish jurisdiction under section 102 of the LMRDA, 29 U.S.C. § 412. The Court held that

section 101(a)(1) "is no more than a command that members and classes of members shall not be discriminated against in their right to nominate and vote." 379 U.S. at 139.

Calhoon does not control the instant case. There the plaintiffs had not argued that the union's eligibility rule had been applied in a discriminatory fashion. The Court stated:

> It is true [the plaintiffs] were denied their request to be candidates, but that denial was not a discrimination against their right to nominate, *since the qualifications were required equally of all members.*

Id. at 139 (emphasis supplied).

In the instant case, plaintiffs have alleged that defendants enforced the rule on dues receipts in a discriminatory manner, with the intent to exclude dissidents from the nominating process. Although the union nominating process is regulated by Title IV of the LMRDA, several Courts of Appeal have upheld granting relief where "a union member has been discriminated against in the exercise of his Title I rights." *Kupau* v. *Yamamoto*, 622 F.2d 449, 455 (9th Cir. 1980). *Accord Depew* v. *Edmiston*, 386 F.2d 710 (3d Cir. 1967); *Schonfeld* v. *Penza*, 477 F.2d 899 (2d Cir. 1973); *McNail* v. *Amalgamated Meat Cutters*, *supra*, 549 F.2d at 540. In particular, such relief is appropriate where the discrimination operates to exclude those who most vigorously are asserting their rights of free speech and participation in the nominating process. *Schonfeld* v. *Penza*, *supra*. Plaintiffs' materials, if uncontroverted by the defendants, could establish a prima facie case of such discrimination. Therefore, this court has jurisdiction to determine whether plaintiffs can sustain their claims. *McNail*, *supra* at 540-41.

In addition, defendants argue that this court lacks jurisdiction over this action because plaintiffs, in particular

Robert Lunnen, have failed to exhaust their internal union remedies.

> Requirement of internal exhaustion is discretionary. Exhaustion has not been demanded when plaintiffs will suffer irreparable harm in the exercise of their LMRDA rights, when resort to the internal appeals structure would be futile, or when the union has consistently taken a position opposed to plaintiff and shows no inclination to change its views.

Amalgamated Clothing Workers v. *Amalgamated Clothing Workers*, 473 F.2d 1303, 1308 (3d Cir. 1973) (citations omitted). On the basis of the materials before it, the court concludes that plaintiffs' failure to exhaust union remedies is not now a bar to jurisdiction over this action.

III.

TEMPORARY RELIEF

Under section 102 of the LMRDA a federal district court has authority to grant injunctive relief against violations of Title I of the Act. 29 U.S.C. § 412. It may issue a temporary restraining order enjoining an election to avoid irreparable injury to the plaintiffs. *Backo* v. *Local 281, United Brotherhood of Carpenters & Joiners*, 438 F.2d 176, 180 (2d Cir. 1970), *cert. denied*, 409 U.S. 858 (1971); *Sheridan* v. *United Brotherhood of Carpenters*, 191 F. Supp. 347, 349 (D. Del. 1961).

On the basis of the pleadings, memorandum and affidavits filed by the plaintiffs, the court finds that opening and counting the ballots before the hearing on the plaintiffs' motion for a preliminary injunction is completed will result in irreparable harm to the plaintiffs. Two elements of harm are present. First, the announcement of the results of an election which may prove to have been conducted in violation of section 101 of the LMRDA may have an adverse impact on plaintiffs' chances of success in any subsequent election and may discourage active

participation in union business by members of the dissident group. Second, allowing the election results to become final may, under 29 U.S.C. § 483, have the effect of depriving this court of jurisdiction over this action, *but see Kupau* v. *Yamamoto*, *supra*, and thereby compel plaintiffs to pursue a time-consuming complaint process with the Secretary of Labor. *Id.* Therefore, in order to preserve the status quo, the court will order the ballots received by Local No. 82 sealed and delivered to the court pending a final determination of plaintiff's motion for a preliminary injunction.

/s/ Robert E. Keeton
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Case Title Omitted In Printing]

ANSWER TO AMENDED COMPLAINT

Defendants answer the Amended Complaint as follows:

1. Denied

2. Denied

3. Denied

4. Deny that Dennis Bates is a member of Teamsters Local Union No. 82. Admit the remainder of the allegations.

5. Admit that the Plaintiffs are employees of companies in the Boston area which have negotiated collective bargaining agreements with Local 82. Deny there are approximately 14 companies in the Boston area with agreements with Local 82.

6. Deny that Joseph Trask is a spare. Admit the remainder of the allegation.

7. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation.

8. Denied

9. Denied

10. Denied

11. Admitted

12. Admit sentence 1, sentence 2, sentence 5, and "Phillip Piemontese is the Chairman of the Election Committee of Local 82." Deny the remainder of the allegations.

13. Deny that true and accurate copies of the relevant portions of the Constitution and By-Laws are appended

as Exhibits A and B. Admit the remainder of the allegations.

14. Denied

15. Deny sentence 1. Admit sentence 2.

16. The Defendants are without knowledge or information sufficient to form a belief to the truth of the allegation in sentence 1. Deny sentence 2.

17. Denied

18. Denied

19. Admitted

20. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations.

21. Denied

22. Denied

23. Denied

24. Admit that prior to November 9, 1980, the expressed policy and practice of the Union regarding admittance into Union meetings was that every member had to show his dues receipt indicating payment of dues through the prior month. Deny the remainder of the allegations.

25. Admit that on November 9, 1980, Jerome Crowley and all other members were refused admittance to the meeting if they did not have their October, 1980 dues receipt. Deny the remainder of the allegations.

26. The Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations.

27. Denied

28. Deny that Article IV, Section 3(b) of the By-Laws bars members from running for elective office. Deny that Defendant Griffiths read a list of eight members who were ineligible to be candidates. Admit that at the November 9, 1980 meeting Defendant Griffiths read a list of members, including Plaintiffs Lunnin, Hayes, and Coyne, who were ineligible to be candidates for office due to their failure to comply with the Union's 24-month rule which is stated in the International Constitution and the Local Union's By-Laws. Admit that the 24-month rule bars members who have not paid their dues in full and on time in every month of the 24 months preceding nominations from being eligible to hold office.

29. Admit Plaintiff Coyne was disqualified under the 24-month rule due to the fact that he had paid his dues late in the preceding 24 months and on that occasion was 5 days late in making his payment. Admit that a true copy of Plaintiff Coyne's dues payment printout is attached as Exhibit C. Deny the remainder of the allegations.

30. Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations.

31. Admit that Defendant Griffiths read a list of members whom he said were eligible to run for Union office. Admit that many more than the names read were eligible for office. Deny the remainder of the allegations.

32. Denied

33. Admit that Plaintiff Owens was nominated for office and was declared ineligible due to his non-compliance with the 24-month rule. Admit that John Lynch is listed as a candidate on the ballot. Deny the remainder of the allegations.

34. Denied

35. Admit sentence 1. Deny sentence 2.

36. Deny sentence 1. Admit sentence 2.

37. Admit sentence 1. Deny sentence 2.

38. Denied

39. Admit sentences 1 and 2. Deny sentence 3.

40. Denied

41. Admit sentence 1. Deny the remainder of the allegations.

42. Denied

43. Denied

44. Denied

45. Denied

46. Denied

47. Denied

48. Denied

49. Denied

50. Denied

51. Denied

52. Denied

Defendants present the following defenses:

I. The Court lacks subject matter jurisdiction because the subject matter of the complaint lies within the exclusive jurisdiction of the Secretary of Labor to investigate as provided by Title IV of the Labor-Management Reporting and Disclosure Act.

II. The complaint fails to state a claim against the Defendants upon which relief can be granted as the Plaintiffs have failed to exhaust their internal union remedies.

Respectfully submitted,

By the Defendants,

By Their Attorney,

/s/ Kathryn M. Noonan
KATHRYN M. NOONAN
Noonan & Robboy
6 Beacon Street
Boston, MA 02108
(617) 720-0181

[Certificate of Service Omitted in Printing]

LETTER OF DEFENDANTS TO COURT

NOONAN & ROBBOY
ATTORNEYS AT LAW

6 Beacon Street
Boston, Massachusetts 02108

January 9, 1981

The Honorable Robert E. Keeton
United States District Court for
District of Massachusetts
U.S. Post Office & Courthouse
Boston, Massachusetts 02109

RE: Jerome Crowley et al

v.

Local No. 82 et al

Civil Action No. 80-2680-K

Dear Judge Keeton:

On behalf of the Defendants in the above-captioned matter I request a status conference or hearing so that I may advise the Court that the Union is prepared to hold a new nomination meeting and mail ballot election, with the permission of the Court. The Union will request the Joint Council to conduct the nomination and election process and will send notice of the nomination meeting to the last known address of members. The notice will advise members of the eligibility requirements to run for office including the 24 month continuous good standing rule. The notice will also advise members that the 50% attendance rule is waived for this nomination and election. All members in good standing will be permitted to attend this meeting and make nominations. Members will be permitted to pay their dues at the door to bring

themselves in good standing in order to gain entrance to the nomination meeting.

Another reason for conducting the status conference is to request relief from the production of the 24 month dues payment history of the membership, if the Union is allowed to conduct another nomination and election. By conducting another nomination and election I believe the relief requested by the Plaintiffs in their Modified Motion for Preliminary Injunction regarding the nominations and election process is substantially satisfied but for the elimination of the 24 month continuous good standing rule for eligibility for office. With that sole issue remaining the Court is faced solely with a Title IV claim and accordingly lacks jurisdiction to consider the validity of the rule. On that basis I would request relief from the production request or at least request a stay in the production request until the Court determines whether it has jurisdiction to rule on the validity of the rule notwithstanding the Union's lack of contest on the conduct of a second nomination and election.

Very truly yours,

/s/ Kathryn M. Noonan
KATHRYN M. NOONAN

cc: Kurt M. Pressman

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Title Omitted in Printing]

STIPULATIONS OF THE DEFENDANTS

Teamsters Local 82 is prepared to and will conduct a second nomination and mail ballot election for the election of officers under the following terms, provided the Court permits a change in the status quo preserved by its Order of December 12, 1980:

1) Teamsters Local 82 will request that Teamsters Joint Council 10 make provision for, supervise and, in all other respects, conduct a nomination meeting and mail ballot election for the officers of Local 82 in accordance with the Constitution and By-Laws of Local 82, the Constitution of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and applicable law.

2) Each member of Local 82 will be mailed a combined notice of nominations and election at his last known home address at least 20 days prior to the date of the nomination meeting. In addition, such notices will be posted at the facilities of all employers which have collective bargaining agreements with Local 82.

3) The combined notice of nomination and election will contain the following information:

a) The date, time and place of the nomination meeting.

b) The list of offices to be filled: President and Business Agent, Vice-President, Secretary-Treasurer and Business Agent, Recording Secretary and 3 Trustees who together comprise the Executive Board.

c) The duration of the terms of office: January 1981 - December 1983.

d) The eligibility requirements for members to attend the nomination meeting: Every member whose dues are paid up through the month prior to the month in which the nominations are held has the right to attend the nomination meeting. Members may pay their dues at the door prior to the commencement of the nomination meeting to bring their dues payments current through the month prior to the month in which the nomination meeting is held.

e) The eligibility requirements to run for office:

i) Every member in good standing, by the payment of his dues on or before the last business day of the current month, in accordance with the International Constitution, and who has been in such continuous good standing for each consecutive month in the twenty-four (24) month period immediately prior to nominations, shall be eligible to hold office if otherwise qualified under the International Constitution, Local By-Laws and applicable law. Payment of dues after their due date does not restore good standing status for such month in computing the continuous 24 month good standing status as a condition of eligibility for office.

ii) A member otherwise qualified to run for office must be nominated at the nomination meeting by a member in good standing other than the nominee and seconded by a member in good standing other than the nominee. A member is entitled to nominate only one candidate for each office.

iii) The 50% meeting attendance eligibility requirement contained in Article VI of the Local Union By-Laws is waived for this nomination and election.

f) The nomination and election rules are set forth in the Local By-Laws and International Constitution which are available for inspection at the Local 82 offices and may be purchased upon payment of $.50.

g) All officers and business agents elected in the forthcoming election shall, by virtue of such election, be delegates to any International Convention which may take place during their term of office and the officers elected in the forthcoming election shall be delegates to all Teamster subordinate bodies and all other conventions in accordance with the provisions of Article II, Section 4(f) and Article III, Section 5 of the International Constitution.

h) Prior to the nomination meeting a member may request that his eligibility to hold office be reviewed. An official of Joint Council 10 shall be designated by Joint Council 10 to answer such inquiries. The designated official of Joint Council 10 shall make a report on the eligibility of that member within 5 days thereafter to any interested member.

i) All arrangements for distribution of campaign literature shall be made by Joint Council 10 consistent with the By-Laws, International Constitution and applicable Law.

j) The election shall be conducted by mail ballot. The notice will specify the date ballots and other election materials and instructions will be mailed, the date and time ballots will be collected for counting and the location of the ballot count. The notice will also specify that voting packets will be mailed to each member's last known home address at least 20 days before the counting of the ballots. The notice will describe

the procedure to be followed to obtain a ballot if the member does not receive a ballot in the mail. If two ballots are received from the same member, both will be declared null and void and not counted.

k) A member's vote will be counted only if he has paid his dues through the month prior to the month in which the election is held. Members may pay their dues before the close of business at 5:00 p.m. on the day prior to the counting of the ballots.

l) Each candidate, at his own expense, shall have the right to have an observer other than himself present for the mailing of ballots, the removal of ballots from the post office and at the subsequent counting of the ballots.

4) The nomination meeting will be held on Sunday, March 22, 1981 and the ballots will be counted on Saturday, April 25, 1981.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Case Title Omitted in Printing]

SUPPLEMENTAL STIPULATIONS OF THE DEFENDANTS

Teamsters Local 82 submits the following supplemental stipulations to clarify matters raised by the Court at the hearing of January 15, 1981:

1) The notice of nomination and election will notify members that the purpose of the meeting will be the nomination of officers.

2) The notice of the nomination and election will advise members that they may be admitted to the nomination meeting by presentation of a TITAN computer receipt showing payment through the prior month or by presentation of a TITAN receipt and a temporary receipt issued after the date of issue of the TITAN receipt which verifies payment through the prior month or by payment at the door of their dues through the prior month.

3) The nomination and election notice will contain a statement that in order to be nominated for office a member must either be present at the meeting to accept the nomination or must have a signed statement indicating his acceptance of nomination for a particular office delivered to the presiding official at said meeting.

4) The nominations and election will be conducted consistent with the procedures described in Section II B of the Defendants' Supplemental Memorandum filed 1/22/81.

Respectfully submitted,

/s/ Kathryn Noonan
KATHRYN NOONAN
6 Beacon Street
Boston, MA 02108
(617) 720-0181

/s/ Gary S. Witlen (KAN)
GARY S. WITLEN
25 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 624-7466

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Case Title Omitted in Printing]

PLAINTIFFS' MOTION TO AMEND COMPLAINT TO CONFORM TO THE EVIDENCE

The Plaintiffs in the above-entitled matter hereby move the Court for leave to amend their Complaint to conform to the evidence presented at the hearing on their Motion For Preliminary Injunction, by adding the following paragraphs:

17a. Defendant Local 82 and its officers have on several occasions raised its rate of monthly dues for members from the rate of $9.00, established in September, 1976 to the present rate of $15.00, without a vote of the membership and at times and in a manner other than that prescribed by the International Constitution of the union.

32a. The Defendants applied the "24 month rule" in a discriminatory fashion in that they (a) declared Plaintiff James Hayes ineligible, although he in fact was in compliance with said rule, and (b) declared Paul Maguire, Joseph Crowley, and Wilfred Pye, all of whom were either incumbent officers and/or close supporters of the Defendants, eligible even though those three members were not in compliance with said rule.

53. All increases in the rate of dues by Defendant Local 82 since the $9.00 rate of September, 1976, violated 29 U.S.C. § 411(3) and Article X § 3(d) of the International Constitution.

54. The Defendants' discriminatory application of the 24 month rule constitutes an unlawful retaliation for the Plaintiff's expression of their views within the union in violation of 29 U.S.C. § 411 (a) (1).

55. The Defendants' discriminatory application of the 24 month rule denied Plaintiffs their equal right to nominate and vote for eligible candidates, in violation of 29 U.S.C. § 411 (a) (1).

PRAYERS FOR RELIEF

8. Declare that all dues increases by Local 82 since September 1976 are invalid and that any member of Local 82 is eligible for union office if he is in compliance with the 24 month rule once all his dues payments in excess of $9.00 per month are credited prospectively towards subsequent dues payments, and if he is otherwise eligible for union office.

By their attorneys,

/s/ Mark D. Stern
MARK D. STERN

/s/ Kurt H. Pressman
KURT H. PRESSMAN

/s/ Benjamin Hiller
BENJAMIN HILLER
Goldstein, Pressman and Stern
678 Mass. Avenue
Cambridge, Ma. 02139
(617) 492-2211

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Case Title Omitted in Printing]

ORDER

February 12, 1981

The parties are requested to submit their positions on the proposed order, stated below, by Tuesday, February 17, 1981. A conference will be scheduled for some time after February 17th, for consideration of the proposed order as well as Plaintiffs' Motion for Supplemental Preliminary Relief.

Considerable portions of the proposed order are derived from defendants' proffered stipulations. If, however, in light of the court's modifications, defendants wish the order not to state that paragraphs 3-5 of the order are substantially derived from the stipulations filed by defendants, they should so inform the court at the conference. In addition, the parties are directed to consult to determine if they can agree upon a method by which proposed order can be either recorded or otherwise memorialized in order to reduce the likelihood that an extensive evidentiary hearing would be needed should a dispute concerning the conduct of that meeting arise. Counsel are requested to ascertain whether Joint Council 10 would be prepared to conduct the election in conformity with paragraph 9 of the proposed order.

Proposed Order Concerning the Conduct of the Election

Based on the Findings of Fact and Conclusions of Law incorporated in the court's Memorandum of this date, and defendants' stipulations, from which paragraphs 3, 4 and 5 of this order are substantially derived, it is hereby ORDERED and DECLARED that:

1. The order entered by the court on December 12, 1980 is modified as set forth below.

2. The nominations received at the November 9, 1980 meeting of defendant Local 82, and the election originally scheduled to be completed on December 13, 1980, are null and void. The ballots from that election shall remain in the custody of an officer of this court.

3. Within — days, Local 82 shall provide for a nomination meeting and mail ballot election for the officers of Local 82, to be supervised and conducted by a third party satisfying the requirements set forth in paragraph 9 of this order. Subject to applicable law and this order, the nomination meeting and election shall be conducted in accordance with the Constitution and By-laws of Local 82, the Constitution of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

4. Each member of Local 82 will be mailed a combined notice of the nominations meeting and election at his last known home address at least 30 days before the date of the nomination meeting. In addition, such notices will be posted, at least 30 days before the date of the nomination meeting, at the facilities of all employers that have collective bargaining agreements with Local 82.

5. The combined notice of nomination and election will contain the following information:

a. The date, time and place of the nomination meeting.

b. A declaration that:

> The purpose of this meeting will be the nomination of officers for Local 82. After hearings in the Federal District Court, the incumbent officers of Local 82 have offered to have, and the court has ordered, a new election, which will be conducted by a third party in order to assure that the nominations and election are conducted in a fair and orderly fashion.

c. The list of offices to be filled: President and Business-Agent, Vice-President, Secretary-Treasurer and Business-Agent, Recording Secretary and three Trustees, all of which together constitute the Executive Board.

d. The duration of the terms of office: January 1981-December 1983.

e. The eligibility requirements for members to attend the nominations meeting: Every member whose dues are paid up through the month before the month in which the nominations meeting is conducted has the right to attend the nominations meeting. Members may be admitted to the nomination meeting upon presentation of a TITAN computer receipt showing payment through the prior month or upon presentation of a TITAN receipt supplemented by payment at the door or payment evidenced by a temporary receipt, which TITAN receipt and other evidence taken together verify payment of dues through the prior month.

f. The eligibility requirements to run for office:

(i) Every member in good standing, by the payment of his dues on or before the last business day of the current month, in accordance with the International Constitution, who has been in such continuous good standing for each consecutive month in the twenty-four (24) month period immediately prior to nominations, shall be eligible to hold office if otherwise qualified under the International Constitution, Local By-Laws and applicable law. Dues are considered to have been received by the Local Union when they are in the physical possession of the Union or its authorized agent. Thus, dues paid by mail are received when the dues are delivered to the Union; dues paid in person at the Union hall are received at the time tendered; and dues paid to a steward, business agent, or other authorized collection agent are received when paid to the agent. Payment of

dues after their due date does not restore good standing status for such month in computing the continuous 24 month good standing status as a condition of eligibility for office. However, a member who has made an incorrect dues payment in any month in which the rate of dues has been changed shall be considered in good standing for the month(s) in question so long as he paid the additional amount owed within 3 months of the dues increase.

(ii) A member otherwise qualified to run for office must be nominated at the nomination meeting by a member in good standing other than the nominee and seconded by a member in good standing other than the nominee. A member is entitled to nominate only one candidate for each office.

(iii) The 50% meeting attendance eligibility requirement contained in Article VI of the Local Union By-Laws is waived for this nomination and election.

(iv) In order to be nominated for office, a member must either be present at the nomination meeting to accept the nomination or must have a signed statement indicating his acceptance of nomination for a particular office delivered to the presiding official at said meeting.

g. The nomination and election rules are set forth in the Local By-Laws and International Constitution which are available for inspection at the Local 82 offices and may be purchased upon payment of $.50.

h. All officers and business agents elected in the forthcoming election shall, by virtue of such election, be delegates to any International Convention which may take place during their term of office, and the officers elected in the forthcoming election shall be delegates to all Teamster subordinate bodies and all other conventions in accordance with the provisions of Article II, Section 4(f) and Article III, Section 5 of the International Constitution.

i. Before the nomination meeting, a member may request that his eligibility to hold office be reviewed. An official of the third party conducting the election shall be designated by such third party to answer such inquiries. The designated official shall make a report on the eligibility of that member within 5 days thereafter to any interested member. If a report of ineligibility because of late payment is challenged on the ground that the TITAN receipt is incorrect and payment was actually delivered to the Union sooner than the date recorded on TITAN, the third party conducting the election shall hear the challenge and make a written determination within five days.

j. All arrangements for distribution of campaign literature shall be made by the third party conducting the election consistent with the By-Laws, International Constitution and applicable law.

k. The election shall be conducted by mail ballot. The notice will specify the date ballots and other election materials and instructions will be mailed, the date and time ballots will be collected for counting, and the location of the ballot count. The notice will also specify that voting packets will be mailed to each member's last known home address at least 20 days before the counting of the ballots. The notice will describe the procedure to be followed to obtain a ballot if the member does not receive a ballot in the mail. If two ballots are received from the same member, both will be declared null and void and not counted.

l. A member's vote will be counted only if he has paid his dues through the month prior to the month in which the election is held. Members may pay their dues before the close of business at 5:00 p.m. on the day prior to the counting of the ballots.

m. Each candidate, at his own expense, shall have the right to have an observer other than himself present for

the mailing of ballots, the removal of ballots from the post office, and the subsequent counting of the ballots.

6. All members meeting the eligibility criteria set forth in paragraph 5(e) shall be permitted to attend the nominations meeting.

7. All members meeting the eligibility criteria set forth in paragraph 5(f) shall be permitted to run for office.

8. All members meeting the eligibility criteria set forth in paragraph 5(l) shall be permitted to vote.

9. A third party seeking to supervise and conduct the nominations and election required by this order shall file an undertaking with the court indicating its consent to the terms and conditions of this order, and in addition, shall:

a. Provide for the designation of an official to answer inquiries and make reports on members' eligibility to hold office as set forth in paragraph 5(i).

b. Make all arrangements for distribution of campaign literature as set forth in paragraph 5(j) of this order.

c. Ensure that no member of said third party who participates in the supervision or conduct of the nomination and election required by this order shall have any interest in the outcome of the election.

10. The defendants, Bart A. Griffiths, George Harris, Phillip Piemontese, and Local 82, are enjoined from violating Title I of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 411 *et seq.*

11. This order shall remain in effect until further order of this court.

/s/ Robert Keeton
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Case Title Omitted In Printing]

ORDER

April 21, 1981

At a conference on Thursday, April 23, 1981, at 10:00 a.m., the parties are requested to state their positions on the modifications, stated below, in the court's proposed order of February 12, 1981. Any objection previously asserted to the court's proposed order of February 12, 1981 need not be restated to preserve an exception to the court's rulings. Counsel are requested to ascertain whether Lawrence Katz and Paul Keenan will consent to the terms and conditions of the modified proposed order, and whether they can be present at the conference on the 23rd.

Modified Proposed Order Concerning The Conduct of the Election

For the reasons stated in open court and in a memorandum to be filed, and based upon the findings and conclusions stated in open court and in the memorandum, it is hereby ORDERED and DECLARED that:

1. The order entered by the court on December 12, 1980 is modified as set forth below.

2. The nominations received at the November 9, 1980 meeting of defendant Local 82, and the election originally scheduled to be completed on December 13, 1980, are null and void. The ballots from that election shall remain in the custody of an officer of this court.

3. Local 82 shall provide for a nomination meeting and mail ballot election for the officers of Local 82, to be supervised and conducted by Lawrence Katz, Esquire, in

conjunction with the Honest Ballot Association of New England, ("the Arbitrators") in accordance with paragraph 9 of this order. The nomination meeting shall be held within 60 days of the entry of this order. Subject to applicable law and this order, the nomination meeting and election shall be conducted in accordance with the Constitution and By-laws of Local 82, the Constitution of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

4. Under the supervision of the Arbitrators, Local 82 shall mail each member a combined notice of the nomination meeting and election at his last known home address at least 40 days before the date of the nomination meeting, and, in addition, shall post notices at least 40 days before the date of the nomination meeting, at the facilities of all employers that have collective bargaining agreements with Local 82.

5. The combined notice or nomination and election will contain the following information:

a. The date, time and place of the nomination meeting.

b. A declaration that:

> The purpose of this meeting will be the nomination of officers for Local 82. After hearings in the Federal District Court, the incumbent officers of Local 82 have offered to have, and the court has ordered, a new election, which will be conducted by a third party in order to assure that the nominations and election are conducted in a fair and orderly fashion.

c. The list of offices to be filled: President and Business-Agent, Vice-President, Secretary-Treasurer, and Business-Agent, Recording Secretary and Three Trustees, all of whom together constitute the Executive Board.

d. The duration of the terms of office: January 1981-December 1983.

e. The eligibility requirements for members to attend the nominations meeting: Every member whose dues are paid up through the month before the month in which the nomination meeting is conducted has the right to attend the nomination meeting. Members may be admitted to the nomination meeting upon presentation of a TITAN computer receipt showing payment through the prior month or upon presentation of a TITAN receipt supplemented by payment at the door or payment evidenced by a temporary receipt, which TITAN receipt and other evidence taken together verify payment of dues through the prior month.

f. The eligibility requirements to run for office:

(i) Every member in good standing, by the payment of his dues on or before the last business day of the current month, in accordance with the International Constitution, who has been in such continuous good standing for each consecutive month in the twenty-four (24) month period immediately prior to nominations, shall be eligible to hold office if otherwise qualified under the International Constitution, Local By-Laws and applicable law. Dues are considered to have been received by the Local Union when they are in the physical possession of the Union or its authorized agent. Thus, dues paid by mail are received when the dues are delivered to the Union; dues paid in person at the Union hall are received at the time tendered; and dues paid to a steward, business agent, or other authorized collection agent are received when paid to the agent. Payment of dues after their due date does not restore good standing status for such month in computing the continuous 24 month good standing status as a condition of eligibility for office. However, a member who has made an incorrect dues payment in any month in which the rate of dues has been changed shall be considered in good standing for the month(s) in question so long as he paid the difference in the

rates of dues owed to the local Union before the start of the nomination meeting scheduled under the order of this court.

(ii) Any member who claims that he fails to meet the eligibility requirements stated above only because

(A) between June 1979 and October 1980, he failed to pay increases in his dues implemented in June or August 1979; OR

(B) between November 1979 and October 1980, he failed to pay increases in his dues implemented in November and December 1979 and January and April 1980; must file a claim in writing with the Arbitrators, together with supporting evidence, no later than 15 days before the nomination meeting. The Arbitrators shall make findings as to whether the claimant satisfies the criteria set forth in (A) or (B), and shall compile the claims and findings into a report to be filed with the court not later than 7 days before the nominations meeting, upon which the court shall determine whether a claimant should be permitted to run for office despite his failure to protest sooner the dues increases listed above.

(iii) A member otherwise qualified to run for office must be nominated at the nomination meeting by a member in good standing other than the nominee and seconded by a member in good standing other than the nominee. A member is entitled to nominate only one candidate for each office.

(iv) The 50% meeting attendance eligibility requirement contained in Article VI of the Local Union By-Laws is waived for this nomination and election.

(v) In order to be nominated for office, a member must either be present at the nomination meeting to accept the nomination or must have a signed statement indicating his acceptance of nomination for a particular office delivered to the presiding official at said meeting.

g. The nomination and election rules are set forth in the Local By-Laws and International Constitution which are available for inspection at the Local 82 offices and may be purchased upon payment of $.50.

h. All officers and business agents elected in the forthcoming election shall, by virtue of such election, be delegates to any International Convention which may take place during their term of office, and the officers elected in the forthcoming election shall be delegates to all Teamster subordinate bodies and all other conventions in accordance with the provisions of Article II, Section 4(f) and Article III, Section 5 of the International Constitution.

i. At any time until 25 days before the nomination meeting, a member may request the Arbitrators to review his eligibility to hold office. The Arbitrators shall make a report on the eligibility of that member within 5 days thereafter to any interested member. If a report of ineligibility is challenged on the ground that the TITAN receipt is incorrect, the third party conducting the election shall hear the challenge and make a written determination within five days. Any member asserting that the Arbitrators' determination of the facts underlying his claim for eligibility is not supported by substantial evidence must file a request to set aside the Arbitrators' decision with the Arbitrators within five days of the decision, for transmittal to the court along with a report by the Arbitrators not later than 7 days before the nominations meeting.

j. All arrangements for distribution of campaign literature shall be made by the Arbitrators consistent with the By-Laws, International Constitution and applicable law.

k. The election shall be conducted by mail ballot. The notice will specify the date ballots and other election materials and instruction will be mailed, the date and time ballots will be collected for counting, and the location of

the ballot count. The notice will also specify that voting packets will be mailed to each member's last known home address at least 20 days before the counting of the ballots. The notice will describe the procedure to be followed to obtain a ballot if the member does not receive a ballot in the mail. If two ballots are received from the same member, both will be declared null and void and not counted.

l. A member's vote will be counted only if he has paid his dues through the month prior to the month in which the election is held. Members may pay their dues before the close of business at 5:00 p.m. on the day prior to the counting of the ballots.

m. Each candidate, at his own expense, shall have the right to have an observer other than himself present for the mailing of ballots, the removal of ballots from the post office, and the subsequent counting of the ballots.

6. All members meeting the eligibility criteria set forth in paragraph 5(e) shall be permitted to attend the nominations meeting.

7. All members meeting the eligibility criteria set forth in paragraph 5(f) shall be permitted to run for office.

8. All members meeting the eligibility criteria set forth in paragraph 5(l) shall be permitted to vote.

9. The Arbitrators seeking to supervise and conduct the nominations and election required by this order shall file an undertaking with the court indicating their consent to the terms and conditions of this order, and in addition, shall:

a. Provide for the designation of an official to answer inquiries and make reports on members' eligibility to hold office as set forth in paragraphs 5(f)(ii) and 5(i).

b. Make all arrangements for distribution of campaign literature as set forth in paragraph 5(j) of this order.

c. Ensure that no member of the Arbitrators who participates in the supervision or conduct of the nomination and election required by this order shall have any interest in the outcome of the election.

10. The defendants, Bart A. Griffiths, George Harris, Phillip Piemontese, and Local 82, are enjoined from violating the equal rights of members of Local 82, guaranteed by 29 U.S.C. § 411,

(a) to nominate candidates in the election to be conducted in accordance with this order, to vote in the election, to attend all meetings of Local 82 in which business related in any way to this election is conducted, and to participate in the deliberations and voting upon business of such meetings, subject to the rules and regulations of the constitution and bylaws of the union;

(b) to meet and assemble freely with other members and to express any views, arguments, or opinions relating to the nominations and election to be conducted in accordance with this order, and to express, at meetings of Local 82 in which business in conducted relating in any way to this election, any views upon candidates or upon any business properly before such meetings, subject to the rules and regulations established in this order and in the rules and regulations of the constitution and bylaws of the union.

11. This order shall remain in effect until further order of this court.

12. Local 82 shall pay the fees and expenses incurred by the Arbitrators in discharging their responsibilities under this order.

13. Plaintiffs are not required to post a security under Fed. R. Civ. P. 65(c).

/s/ Robert E. Keeton
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Case Title Omitted in Printing]

STIPULATION OF PARTIES REGARDING LANGUAGE FOR MODIFIED PROPOSED ORDER CONCERNING THE CONDUCT OF THE ELECTION

The parties hereby propose the following modification to the Modified Proposed Order Concerning the Conduct of the Election issued by the Court on April 21, 1981:

Paragraph 4. Substitute: Under the supervision of the Arbitrators, Local 82 shall mail each member a combined notice of the nomination meeting and election at his last known home address at least 40 days before the date of the nomination meeting, and, in addition, shall mail notices for posting at least 40 days before the date of the nomination meeting to the stewards or, if there is no steward, to the employer, at the facilities of all employers that have collective bargaining agreements with Local 82.

Paragraph 5(d). Substitute: The officers elected in the upcoming election will complete the term of office which commenced on January 1, 1981 and which will expire on December 31, 1983.

Paragraph 5(e). Add: Local Union officers, or their designated agents, shall receive dues payments at the door and shall issue temporary dues receipts therefor.

Paragraph 5(f)(ii). Delete in its entirety.

Paragraph 5(f)(iii). Redesignate 5(f)(ii) and amend 2nd sentence to read "A member is entitled to nominate or second the nomination of only one candidate for each office."

Paragraph 5(f)(iv). Redesignate as paragraph 5(f)(iii).

Paragraph 5(f)(v). Redesignate as paragraph 5(f)(iv).

New Paragraph 5(f)(v). Members intending to run for office are urged to verify their own eligibility as well as the eligibility of their potential nominators and seconders prior to the nominations meeting by making a request, in writing, to the arbitrator. The arbitrator shall render decisions concerning the eligibility of any candidate, nominator, or seconder, in accordance with the procedures set forth in paragraph 5(i) of this notice.

Paragraph 5(i). Any member may request in writing that the arbitrator review his eligibility to hold office, or to participate in the nominations meeting as a nominator or seconder at any time prior to the nominations meeting. The arbitrators shall make a report on the eligibility of that member within seven days thereafter to any interested member. Any member may challenge the determination of the arbitrator that a member is either eligible or not eligible to be a candidate for office, or be a nominator or seconder at the nominations meeting. Any challenge to a decision of the arbitrators must be made, in writing, within two days of the arbitrators' decision and must set forth the ground on which the challenge is based. The third party conducting the election shall hear the challenge and make a written determination within five days of receiving the challenge. Any member asserting that the arbitrators' determination of the facts underlying his claim for eligibility is not supported by substantial evidence must file a request to set aside the arbitrators' decision with the arbitrators within five days of the decision, for transmittal to the court along with a report by the arbitrators. After the nomination meeting, the arbitrator shall review the eligibility of any candidate whose eligibility had not previously been determined and shall make a determination of each such candidate's eligibility within 48 hours of the nominations meeting. If, following the nominations meeting, the arbitrator de-

termines that a candidate is ineligible, he shall notify the candidate by telephone within 48 hours of the nominations meeting and shall confirm this communication to the candidate in writing. In addition, the arbitrator shall notify counsel for the plaintiffs and defendants by telephone of the eligibility determinations made following the nominations meeting, within 48 hours of the nominations meeting, and shall confirm this communication to counsel in writing. Challenges to the decisions of the arbitrator concerning the eligibility of the nominees must be filed, in writing, with the arbitrator within 48 hours of the arbitrator's decision and must set forth the specific basis upon which the challenge is made. The arbitrator conducting the election shall hear the challenge and make a written determination within 7 days. Any member wishing to appeal the determination of the arbitrator must file a request to set aside the arbitrator's decision, with the arbitrator, within 48 hours of the decision, for transmittal to the court along with a report by the arbitrator.

Paragraph 12. Local 82 shall pay the fees and expenses incurred by the arbitrators in discharging their responsibilities under this order in the amount determined by the Court and shall advance to the arbitrators the amounts necessary to cover the postage required to mail the notices and balloting materials necessitated by this order.

For the Plaintiffs,

/s/ Kurt Pressman 5/48/1

KURT PRESSMAN (Date)

For the Defendants,

/s/ Kathryn M. Noonan

KATHRYN M. NOONAN (Date)

U.S. DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

TRANSCRIPT

December 5, 1980

* * * *

[11] MR. PRESSMAN: In our relief we are asking that the defendants be ordered to collect these ballots but enjoined from counting them and that the Court order the defendants to reopen the nominations to give all members proper notice and equal notice in accordance with the statute and with their own bylaws, to order that the defendants include in [12] the notice of said meeting a statement that no member of the union shall be disqualified from attending the meeting or nominating candidates on account of the fact that they were either employed as spares or because they have exercised their rights to freedom of speech or because they haven't paid their dues on time every month for the last 24 months unless the defendants choose to allow some sort of grace period for that.

* * * *

[16] . . . All their claims are Title 1 claims. There are questions regarding eligibility requirements which if taken alone might be Title 4 claims. When I say Title 4, basically what we are talking about is that Title 4 sets forth certain election procedures and the Supreme Court in the case of Calhoun v. Harvey has said the issue of eligibility requirements is properly a matter that comes under Title 4. The significance of this is that when Title 4 rights are violated the party must seek relief by first exhausting all his internal union remedies up to a certain point in time, then filing a complaint with the Secretary of Labor. If the Secretary of Labor finds probable cause the Secretary of Labor can go into federal court to seek the election conduct bill be overturned.

However what we are claiming here is that although there is one violation, the strict application of the eligibility rule which is a Title 4 complaint if looked at narrowly, then we have to look at this in the overall context of being a series of actions of a purposeful and [17] deliberate attempt by union officials to suppress dissent within the union and that this is just one more act, along with the seven or eight other acts, the others of which are Title 1 violations, and that it would be appropriate in this case to enjoin the strict application of the eligibility rule along with providing Title 1 relief, injunctive relief of the other violations for two reasons. One, it is not an isolated event but the application of this rule is part of the pattern of suppressing free speech within the union by restricting eligibility to only a small number of people and furthermore not even announcing all the people who would even be eligible under the 24-month rule but only announcing names of primarily the defendants and their close supporters. In that context we don't think the plaintiffs can get full relief to their Title 1 rights unless the application of the 24-month rule is also enjoined.

Secondly I would say that if the Court were to grant injunctive relief as to all the other violations it would in fact violate the purpose of the statute as well as the spirit of the Supreme Court in Calhoun versus Harvey not to [18] enjoin this rule. In that case what the Court was saying, they don't want individual union members to be able to disrupt elections by challenging eligibility requirements. In this case if the Court grants relief for a new nominating meeting, all eligible candidates to be nominated, enjoin the discipline of Lunnen, grant the other relief requested, the defendants are going to have to hold a new election and in that event I think it would be appropriate for the Court to rule that this eligibility requirement is improper because otherwise we are going to have a situation where the defendants are again going to hold an election and where the courts have held the strict eligibility requirement is unlawful with the result in six

months or a year the election will have to be run again because this eligibility requirement still remains outstanding.

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[19] MS. NOONAN: Your Honor, I am Kathryn [20] Noonan. I am representing the defendants in this case.

• • • •

[21] Let me at this point say that it's the position of the defendants that this Court has no jurisdiction over this action. As Mr. Pressman tried to slide over and toward the end of his closing remarks there is an interrelationship here between Title 1 of the Labor/Management Reform Act of 1959 and Title 4 of that act. Title 1 contains a bill of rights talking about the equal rights of members to attend meetings and nominate candidates. Based on the information that I think you have before you, of the plaintiffs only one plaintiff, Jerome Crowley, was denied the right to enter the nominating meeting of November 9. So really we are not talking about a whole class of plaintiffs who were not able to attend a meeting on November 9 and also participate in that meeting on November 9.

I note no allegations in the motion for preliminary relief or in the complaint that the plaintiffs who were at the meeting were denied the right to speak.

[22] But in any event, moving to the question of your jurisdiction, Title 1 sets out a certain bill of rights. Title 4 is entitled "Elections" and it sets out specifically, your Honor, certain protections for union members in the election of their officers. But what is more important here, your Honor, is that if union members have some complaint about the procedures, the nominating procedure, the election procedure used by their local union, they are required by Title 4 to file an action with the Secretary of Labor to seek relief. That is their exclusive remedy. Individuals do not have a private right of action to seek relief from supposed violations of their rights to a free and democratic nomination and election procedure.

If you look at the motion for preliminary relief, the great bulk of the allegations speak to the conduct of the local union on November 9, 1980. They are protests in opposition to the procedure used in the nomination and election procedure, period. They are not general allegations about— I shouldn't say general, they are not specific allegations about any other union meeting, your Honor. They focus solely on the November 9, 1980 [23] nominating meeting.

Therefore I suggest to you, your Honor, that any claim that they may have with respect to violations of their rights under that particular—as a result of that particular meeting must be remedied by their filing an action with the Secretary of Labor.

• • • •

[27] THE COURT: Wouldn't it be relevant evidence what number of people are eligible if this rule is applied? That is, if the allegation is sustained that it produces such a small percentage of the 750 membership on its face there is some reason to be concerned about whether the rule is not an inappropriate one and in light of the purposes of the purposes of the statute—

MS. NOONAN: I grant you the question as to the impact of that particular rule would be a relevant consideration to whatever Court is looking at a challenge to that particular eligibility procedure. But I suggest to you that Title 4 of the LMRDA reserves that inquiry first of all to the Secretary of Labor and if he then finds probable cause that a violation of the statute has occurred, i.e., that there is an unreasonable qualification applied to the right to be nominated, then the Secretary of Labor then comes into Court and files an action in his own name against the responsible union officials.

So that for your inquiry this morning and for the inquiry of this Court f this case I suggest that is not a relevant consideration. It's an interesting point if this case were before [28] the Secretary of Labor if we were

here defending a case brought by the Secretary of Labor. We are not in that posture and I think my brother himself has conceded that that kind of a question, the eligibility to run for office, is clearly within Title 4 of the act.

But in any event, your Honor, if you think that kind of information, you would like that kind of information before you rule on the motion for preliminary relief then I will inquire of my clients and submit an affidavit as to the impact of that rule.

But as I was indicating, your Honor, the Supreme Court in Calhoun versus Harvey directed the district courts not to be fooled by the allegations of a complaint that Title 1 of the LMRDA had been violated but rather to look at the substance of the claim, to understand and analyze exactly what it is the plaintiffs are seeking and I suggest to you here, your Honor, they are seeking relief which can only be brought or obtained under Title 4 and they are seeking relief from violations, claimed violations which occurred under Title 4, with the one exception of Mr. Lunnen's disciplinary claim. • • •

• • • •

December 12, 1980

[2] THE COURT: I think perhaps it will advance matters if I advise you first that I have examined your memorand[illegible]n the jurisdictional question and I conclude that Calhoun is clearly distinguishable. It did not involve any claim of discrimination in the application of criteria for participation in the election process. There are plainly in this case such allegations of discrimination and there are a number of Court of Appeals decisions that have distinguished Calhoun on this ground and have quite clearly held that the District Court has jurisdiction over Title 1 claims of discrimination regardless of the fact that it relates also to Title 4 election violations, so I deny the de-

fendant's challenge to jurisdiction and hold that the Court does have jurisdiction over the claims of discrimination.

• • • •

[11] THE COURT: I will not allow the election process to be consummated while this matter is under consideration by me. It may well be that it's being purportedly consummated would have no legal effect but I do not think I should allow any [12] change in the existing circumstances while this hearing is pending. Therefore unless there is agreement, and I'm not even sure that under those circumstances I should permit it, unless there is agreement it seems to me I must act today to require that there be no change in existing circumstances to protect the jurisdiction of this Court.

• • • •

December 19, 1980

[8] MR. PRESSMAN: Mr. Lunnin.

ROBERT EDWARD LUNNIN, Sworn

DIRECT EXAMINATION

BY MR. PRESSMAN:

Q. Mr. Lunnin, please address your answers to the Court, not to me, and speak loudly. What is your full name?

A. Robert Edward Lunnin.

Q. And where do you live?

A. 761 East 6th Street, South Boston.

Q. Are you a member of Local 82?

A. Yes, I am.

Q. And to your knowledge are you in good standing at this time?

A. Yes, I am.

Q. With regards to dues payments?

A. With my dues, yes. But I have been brought up on charges.

• • • •

[9] Q. Now how long have you been a member of Local 82?

A. Approximately around 25 years.

• • • •

[14] Q. How about the last meeting that you attended? When was that?

A. November 9.

Q. About how many members attended that meeting?

A. I'd say between 50, 60.

Q. How about the meeting before, the last meeting you attended before that, when was that?

A. That was in October. I think there was about 25 then.

• • • •

[38] Q. Did you see any notice of this meeting posted there?

A. Yes, I believe I got in touch with Bob Coleman.

Q. Who is Bob Coleman?

A. I was the shop steward then.

Q. And what happened?

A. And I finally got the notice.

Q. Posted?

A. Yes.

Q. And when was that?

A. A week before nominations.

Q. A week before that November 9 meeting?

A. Right.

• • • •

[42] A. Yes, They delegated me and a few other gentlemen to go in and negotiate with the business agent and the executive board to see what was going on, to see if we could get these members in here.

Q. Did you have your dues receipt with you, by the way?

A. Yeah, I believe I did.

Q. Now had this requirement that dues receipts be shown prior to admittance to the meeting, has that been the general practice of the union in prior meetings?

A. No, it hasn't.

Q. Has it ever been raised as a prerequisite for entrance at prior meetings?

A. No, I don't believe I ever recall it ever being raised.

Q. What was the general practice for members being admitted to a meeting?

A. Just come to the door and sign in and put [43] your Social Security number.

Q. Were you ever required to show your dues receipt?

A. I can't remember ever showing it, anybody ever asking me for it.

Q. At the previous meeting in October of 1980, were you at that meeting?

A. October? Yes.

Q. And when you entered then did you show your dues receipt?

A. No, we did not.

MS. NOONAN: Objection.

THE COURT: What ground?

MS. NOONAN: Again, your Honor, he is offering a conclusion. He said no, we did not. The question was "did you show your dues receipt"?

THE COURT: All right. I guess the question might have been ambiguous as to what you meant by "you." Break it down.

Q. Did you personally show your dues receipt?

A. No, I did not.

Q. Do you know from your own personal observation whether other members entered the hall without showing dues receipts?

A. The men that come in with me did not show [44] their receipts.

Q. How many men came in with you?

A. About 3, 4.

Q. Now—

A. I believe that was the month that we paid some of our dues.

Q. You paid you dues at the door?

A. Yeah, John Lynch went in and paid I believe it was me and Warren Watson.

Q. Had you ever before paid your dues at the door?

A. Yes, we have been doing it for years.

Q. Have you seen other members do that as well?

A. Yes, many of them.

Q. And were dues accepted at the door?

A. Yes, they were.

Q. By whom?

A. Business agents. Their own stewards would take it off them.

Q. Would they give you a receipt when you paid your dues at the door?

A. Yes.

Q. Now at this meeting any of the people who didn't have dues receipts offered to pay at the [45] door?

A. Yes, the ones they barred from the meeting that Sunday offered to pay their dues although each one of them said they were already paid up.

Q. Do you remember who was barred? How many can you recall?

A. There was about a dozen barred and I went in as their embassy to go in and try to straighten this out for them and I asked them to open their books up and see if these men are paid up and they says no, we don't have the records here and I said could you go back to the office and get the records and let these men in here and have a chance to nominate. No. And I says you are denying these men their rights. I spoke to George Harris and do you know what he told me?

Q. No.

MS. NOONAN: Objection, your Honor.

A. You don't have no rights.

THE COURT: Objection is overruled.

Q. What did he say?

A. You don't have no rights.

Q. So what happened at that point? Did they allow those members that didn't have dues receipts [46] into the meeting?

A. No, they weren't allowed.

Q. Did they allow them to pay their dues at the door?

A. No.

• • • •

[57] Q. Now after Griffiths read off the names of the 12 eligible candidates—

MS. NOONAN: Objection, your Honor, 16.

MR. PRESSMAN: Excuse me, your Honor, 16 eligible candidates.

Q. —what was your impression regarding the eligibility of other candidates?

• • • •

[58] THE COURT: Well, as I understand it, it is being not offered for the purpose of proving their eligibility but offered in relation to his state of mind with respect to his potential right to nominate other persons. I will receive it for that purpose.

Q. What impression did you have regarding the eligibility of candidates other than these 16?

A. The impression I had? I had the impression that's all the people that was eligible to run for office.

• • • •

[59] Q. When Mr. Owens was nominated for office did Mr. Griffiths or any other member of the executive board respond to the issue of his eligibility?

A. The issue was brought up that they didn't know if he was eligible.

Q. Did they state why they don't know whether he was eligible?

A. I would believe because they didn't have his record.

Q. What did Mr. Griffiths say regarding his eligibility?

A. I believe he said he would check on it the following day.

Q. Was anyone else nominated who wasn't eligible who was declared ineligible at that time?

A. Yes, I believe there was other people.

• • • •

[77] MR. STERN: We have a claim in this case that the 24-month rule violates both Title 1 in its discriminatory application and Title 4. The facts are related to each other. The Court has jurisdiction of this case.

THE COURT: I understand that position.

MR. STERN: And we seek to have adjudicated in these proceedings the question of the 24-month rule's reasonableness per se under Title 4 and we believe we have a right to have that adjudicated.

THE COURT: I understand that position but it is my present view that I will reject that position on the law.

• • • •

[135] JOSEPH V. MONTAGNA, Sworn
DIRECT EXAMINATION

BY MR. STERN:

Q. Would you state your name and address?

A. Joseph V. Montagna, 411 Furnace Brook Parkway, Quincy, Mass.

Q. Are you a member of Local 82?

[136] A. Yes.

Q. Are you in good standing?

A. Yes.

• • • •

Q. Did you see a notice of the nominations meeting of November 9?

A. Yes.

[137] Q. When did you see it?

A. Friday morning, it would have been November 7.

Q. Is that the first time you saw it?

A. Yes.

Q. Did you know from any source prior to that time where the meeting would be held, what time it would be held?

A. No.

Q. Was that the last work day before the meeting for you?

A. Yes.

Q. And prior to that no one had mentioned the time or place of the meeting to you?

A. No.

Q. Had you been to meetings previously?

A. No.

Q. You had never been to a union meeting before?

A. Not in Local 82. Prior to the time I was in Local 82 I was in another local and I have attended meetings but not in Local 82.

• • • •

[140] Q. And when you came to the meeting at some point Mr. Griffiths read off a list of eligible and ineligible persons?

A. Yes.

Q. And was your name among the list of eligible persons?

A. No, it was not.

Q. Did you draw any inference from that?

A. That I would be therefore ineligible to run, should I so desire.

Q. And would you have accepted a nomination for a position in the union if you had been nominated?

A. Yes.

• • • •

[141] Q. Was there an explanation given after the reading of the list as to why only certain persons were eligible to run for office?

A. It was my understanding—
Q. Was there an explanation in fact given?
A. Yes.
Q. Who gave the explanation?
A. Mr. Griffiths.
Q. And what explanation did he give?
A. That these people whose names—someone yelled, you know, why are these specific people being singled out, and his explanation was they were the only ones who had attended enough meetings in the past.

• • • •

December 23, 1980

[4] Q. [BY MR. STERN] State your name and address for the Court, please.
A. My name is Jerome Crowley. I live at 10 Bay State Boulevard in Peabody.
Q. And are you a member of Local 82?
A. Yes, I am, for the last eleven years.
Q. And are you a regular list man or a spare?

• • • •

[5] Q. Did you participate in the past election campaigns?
A. Yes, I have. The previous two elections, I voted for George Harris; and the last election, I try to participate —the last nomination, I try to participate.

• • • •

[12] Q. Now, you said you had attended meetings prior to the November 9th, 1980, meeting. What, if anything, was required of you to obtain entrance into the meetings?
A. A lot of times you were just let in. I had—about a year and a half before that, I wanted to go to a meeting, and I said to Mr. Griffiths I didn't have a stub and he told me that that's okay. You don't need it. It all depends on who you [13] are if you are not a troublemaker. I was told that about a year and a half, I believe.

Q. And, in fact, when you went to Union meetings prior to the November 9th, 1980, meeting, did you have to show your stub to get in?

A. Not really. Joseph Crowley, the sergeant at arms, really didn't bother to check the computer stub. In fact, after the nomination of November 9th, he told me after the meeting—

• • • •

Q. Did Mr. Crowley let you come into the meeting on November 9th without your computer stub?

MR. STERN: There are two Crowleys, your Honor. Joseph Crowley was the man you heard from his testimony as sergeant at the door.

[14] THE WITNESS: Sergeant at arms.

THE COURT: All right.

A. No, I was not let into the November 9th meeting because we were told that you had to have your computer stub to get it. But afterwards, I had a conversation—

• • • •

[113] ANTHONY J. COYNE, Sworn
Direct Examination by Mr. Pressman

• • • •

Q. And are you presently in good standing?

A. Yes, I am.

Q. Have you ever run for office in this Local before?

A. Yes, I have.

Q. When did you run for office?

A. Approximately three years ago. I ran for the office of president of Local 82.

[114] Q. Who did you run against at that time?

A. Mr. Harris.

Q. Did you lose?

A. Yes, I did.

• • • •

[139] Q. Just going back for a moment to that November 9th meeting.

Did you show your—when you were going to the meetings, have you shown computerized dues receipts?

A No, I'll show you what I show.

Q. What do you show?

A. I walk in and I show this to the master at arms—

Q. What is that?

A. This is my membership card from 1966 when I joined this Union.

Q. Does that indicate whether your dues are paid?

A. No. It's just a membership card stating that I joined this Union in 1966.

Q. Have you ever been required to produce your dues receipt—computerized dues receipt—to enter a meeting?

A. Not very often.

Q. Ever?

A. Not that I recall, no. I've always showed this. This is how I get into a meeting.

Q. Okay.

• • • •

[141] Q. Did you listen to the names of the people who were nominated—

A. Yes, I did.

Q. —as trustee?

Did you at any time hear the name of Joseph Crowley—and I'm not referring to Jerome [142] Crowley, but Joseph Crowley—being nominated for trustee?

• • • •

A. [Continued.] The master at arms, you're talking about. Joseph Crowley. He's the master at arms at the meetings. False eye?

Q. Do you know—I don't know.

Do you know that that's his name?

A. That's his name, right. Now I know who you mean.

Q. Did you ever hear his name nominated for—

A. No, he was never nominated.

• • • •

[253] KENNETH P. SPRAGUE, Sworn
Direct Examination by Ms. Noonan

Q. Mr. Sprague, would you state your full name and address for the record?

A. Kenneth P. Sprague, 324 North Quincy Street, Brockton.

Q. Are you a member of Teamsters Local 82?

A. I am.

Q. How long have you been a member?

A. Twenty-four years.

• • • •

[293] Q. Do you know if any of the membership in your group that you're steward for got notice at their homes?

A. No. They didn't.

• • • •

December 24, 1980

[2-144] [THE COURT] Now, there is also the problem with respect to what happens in the meanwhile, whichever way the preliminary injunction goes.

Now, when are the officers scheduled to—would they have taken office had I not entered the restraining order?

MS. NOONAN: Your Honor, the officers would have taken office, I believe I have indicated, the first Union meeting in January of 1981, assuming the ballots had been counted December 13th.

• • • •

[2-145] THE COURT: All right. Now, you see, that is an illustration of the problem that is concerning me. If you are going to be asking for considerable extensions of time, it is plain that the matter will not be resolved before the date that the officers would have taken office.

What happens under those circumstances?

MS. NOONAN: The officers who are presently—the incumbents continue to operate as I understand it. If I can confer with my client on that, your Honor—

THE COURT: All right.

MS. NOONAN: —I don't want to make a misrepresentation.

[Counsel conferred with client.]

MS. NOONAN: The present incumbents, [2-146] your Honor continue to operate. Of course, not all of the incumbents ran again, and I thing that was an indication that they did not wish to continue in office, but they will continue in office, the members of the Executive Board, until such time as their replacements are elected or until incumbents are reelected.

• • • •

[2-148] THE COURT: And that has led me to inquire, then, whether there was any controversy between you about what happens if this matter is still unresolved at the time when the period of tenure in office officially expires.

I have the answer from defense counsel that the incumbents would continue in office until their successors have been determined and qualified.

Is there any controversy over that? That's the question I'm putting at the moment.

MR. STERN: I think that unless the Court directed otherwise, that would be the situation.

THE COURT: Well, when you say "unless the Court directs otherwise," if you have some alternative in mind that the Court could direct, it might be well to advise me what it is.

MR. STERN: Well, it does appear that what is happening is that the incumbents who don't want to run again, who didn't want to run again, are vacating their offices and Mr. Griffiths is appointing people to replace them.

THE COURT: Well, that's—

MR. STERN: That's who Mr. Piemontesie [2-149] testified happened with him, that he has been appointed.

THE COURT: Well, all right. I understand. There may be a problem as to whether I should permit offices to be vacated and successors to be appointed while this matter is under sub judice.

MR. STERN: It also does appear that Union meeting are being suspended; that they're not having Union meetings. They've canceled the December one and said the work load associated with the election which is—I take it to be a reference to this trial. Now, that made it impossible to have one—or I don't know if they used the word "impossible" or not.

MS. NOONAN: Your Honor, could I address the question on Mr. Piemontesie's appointment?

THE COURT: You may.

MS. NOONAN: As I understand it, Mr. Catarino, the vice-president had vacated that office well before the November 9th meeting. It was vacant at the time of the nominations on November 9th. Mr. Piemontesie was nominated for the position of vice-president? Mr. Owens was, also. Mr. Owens was determined to be ineligible; [2-150] therefore, Mr. Piemontesie ran unopposed and was, in fact, under the Constitution and Bylaws, appointed to that position since he ran unopposed as a result of the nominations, unopposed by qualified candidates.

So, I don't think there's been any, you know, wholesale vacating of positions and appointments by Mr. Griffiths to those positions since the November 9th meeting.

And, in addition, the question of the—

THE COURT: Well, did the ballots that were circulated have provisions on them for voting for persons who are unopposed?

MS. NOONAN: No your Honor.

The names on the ballots are—I'll show you the ballot. The names that are on the ballots are for positions where there is a contest. There is no provision in the Constitu-

tion or Bylaws for writing in candidates or somebody who is running unopposed, writing in a name. I think that's clearly what this case is all about. Mr. Lynch claims he was running for secretary/treasurer, and it would have been written in.

THE COURT: It strikes me that there may be an irregularity there.

[2-151] MS. NOONAN: Why, your Honor?

THE COURT: Well, the mere fact that no other nominations are made is not equivalent to election under ordinary rules of order.

MS. NOONAN: Your Honor, in the Constitution and Bylaws of the Union it provides that if you are nominated and you have no opposition, then you are automatically elected to that position.

THE COURT: Well, all right.

I'm not undertaking to rule on that question at the present time. If there is a controversy over it, I'll deal with it when it's presented to me.

• • • •

January 9, 1981

[4] MS. NOONAN: Yes, your Honor. In essence I asked for the conference to let you know that by vote of the executive board last night I was authorized to advise the Court that Local 82 is prepared to run another nomination meeting, another election by mail ballot, send notices out to all members specifying the eligibility requirements for running for office as I set out in the letter. I did not attempt to be all-inclusive in the letter as to what would be contained in those notices. In fact, I think I would be prepared to say that we would give the [5] notices as required by the Constitution and bylaws of the union as requested by the plaintiffs in their modified motion for preliminary relief.

With respect to the good standing question of Mr. Lunnin, Mr. Owens and Mr. Bates, I'm not quite sure what

Mr. Stern means in raising that question. Mr. Lunnin right now has an appeal pending before the joint council as to his disciplinary matter. I have been advised that a hearing was scheduled on that matter for January 13. Mr. Lunnin requested a postponement and it was rescheduled to accommodate his schedule for the evening of January 14.

So the question as to the disciplinary matter, I do still see that as an open issue and I did not attempt to resolve that in the letter. I am focusing merely on the question of the nominations and the election. And so I really don't understand what Mr. Stern means with respect to the good standing question of Mr. Lunnin, Owens and Bates.

THE COURT: I understand him to be raising the question whether it would be the union's position that they were or that they were not eligible (a) to participate in the nomination [6] meeting, (b) to be candidates for office.

MS. NOONAN: Okay. With respect to their right to participate in a nomination meeting which will be held, the second nomination meeting I take that to mean, then there is no restriction on Mr. Lunnin or Mr. Owens or Mr. Bates attending that meeting at this point in time. All members will be required to have their dues paid up through the prior month to attend that meeting. As I have indicated in my letter, the union is prepared to accept dues payments at the door if that is required to have members bring themselves into good standing.

The disciplinary action imposed on Mr. Lunnin, as I have indicated to the Court, there will be no implementation of that discipline while this matter is pending before the Court. So he is free to attend a nomination meeting and so too is Mr. Owens and so too is Mr. Bates.

* * * *

[13] With respect to my suggestion that Joint Council 10 conduct the nomination and the whole election proceeding, I was suggesting that really to—in an effort to

suggest to the Court that the incumbents are prepared to allow some other body, the joint council, to run their meeting. I see nothing in the law that requires or prohibits my clients from running the meeting themselves and they have now turned to a higher body in the union or are prepared to turn to a higher body in the union and asked them to run the meeting for them if they will. I take it from Mr. Stern's comments that these are the issues that are in dispute and I don't think that he and I will be able to resolve them.

THE COURT: Well, all right, I understand that you may not be able to resolve all of them. Let me express my understanding of the situation in another way. Certainly you are free by stipulation to alter the context in which the Court is being asked for preliminary relief and it may be that that altered context would be one that would affect the Court's determination as to whether preliminary relief of any kind was needed [14] and appropriate. And I am now understanding you to say not that you are proposing, if you will, a settlement which must be accepted as a package or not; rather you are proposing to make some stipulations of record which the Court would now take into account in determining whether it went far enough toward meeting the claims that were asserted that the Court should not intrude with preliminary relief. And you may do that and I will then have to hear from opposing counsel as to why they assert that it does not go far enough and hear your arguments as to why it does and make a decision on the matter.

• • • •

MS. NOONAN: Yes, your Honor, and—I understood your temporary restraining order to require the parties to hold the status quo.

THE COURT: Right.

MS. NOONAN: Threfore we are not implementing—the union is not implementing any [15] of this at this point in time. I would suggest to your Honor that we have proposed dates for the nomination meeting and the

election far enough in advance. I am proposing that there be a nomination meeting the third Sunday in March and an election, a mail ballot election to be concluded April 25, I believe that's the Saturday following. And there is that concern, your Honor.

Also, the concern of the executive board in instructing me to approach the Court with the stipulations is really to cut short the matter in as complete a fashion as we can, understanding that there are still some issues that divide the parties, and I would like therefore to have as expeditious a ruling as I can so that we don't all now spend our time writing briefs and reading transcripts which will not really bear on the issue if you decide to hold on to the question of the 24-month rule. I see that as really the basic question here with respect to the nomination and the eligibility, and the election proceeding.

If you determine that in fact the stipulation I am prepared to make addresses most, if not all of the requests for relief in the modified motion for preliminary relief and if in [16] fact you say but I still think I have jurisdiction under Title I of the 24-month continuous good standing rule based on certain allegations in the plaintiff's complaint, I think we can address that narrow issue and I think hopefully have that resolved quickly enough so that we can then proceed with a nomination and an election in March and April. That's my hope so that we all don't waste your and our precious time as well as the energies of everyone concerned.

• • • •

[36] THE COURT: That is another matter. Now Mr. Stern, as I understand Ms. Noonan's position she is prepared to make a stipulation at this point which she asserts will assure the exercise of the rights to nominate, vote, participate in the election in all respects other than being a candidate. And she asserts that being a candidate is not a Title 1 right. Do you contest that proposition?

MR. STERN: Yes, your Honor.

• • • •

[8] THE COURT: Well, I must issue an order, of course, because I have to modify the present order and if you request a decree on all of the terms of the election, I will have to issue an order that determines the matter as to which there is not an agreement. And I will make findings to the extent that they are relevant to the matters as to which I am ordering something that is not agreed to or has not been stipulated to.

[9] MR. STERN: I am a little confused by the phraseology of that as to—

THE COURT: Let me put it to you another way. I am here for the purpose of deciding issues that are before me and that is what I will do. I will not write an opinion that tries to influence the election.

MR. STERN: I am not asking for that.

THE COURT: All right.

MR. STERN: What I am asking for is there is no agreement per se at this point. There is a stipulation of the defendants.

THE COURT: And I will have to resolve any questions as to which there is no agreement and we will have to make findings to the extent they are relevant to the decision I make in resolving those issues.

MR. STERN: Now, I certainly don't want to put the Court through unnecessary tasks but it will not be contained in an order because I make an agreement and therefore not enforceable and therefore attackable by any member of the union in a post-election proceeding before the secretary, by the Secretary of Labor. Then I am in a position where it is irrational for me to make any agreements. If what we agree upon will be contained in a court order and therefore have the sanctity of a court order and enforceability of a court order,

• • • •

[27] THE COURT: Well, don't I have to address that question if she is right about that? Then any order I

issue modifying the terms of the election from what she proposes would be appellative because I had no jurisdiction to do it so before I enter any order I must face the question whether I have jurisdiction to hear it.

MR. STERN: No. I think what she is saying is if you enter an order consistent with her stipulations—

THE COURT: But if I enter an order inconsistent with her stipulation, then what?

MR. STERN: Then you must address the question of jurisdiction.

THE COURT: Well, you are asking me to enter an order inconsistent with her stipulation?

MR. STERN: Yes.

• • • •

January 23, 1981

[2] THE COURT: Now let me say that I had entered the order staying the discovery proceedings because it seemed to me desirable to do so in the hope that we could reach a stipulation, that the parties could reach a stipulation with respect to the manner of [3] conducting the election. I now believe that is going to be impossible and that I will be required to make some rulings about the terms of any election and under those circumstances I think the first issue we should address is whether I should not vacate my order staying discovery, require the discovery to proceed, and the reason I am thinking that may be appropriate is it may well be that one or more of the issues as to the form and manner of conducting the election that I will have to decide because the parties have not been able to agree upon it will involve determination of two issues, one a factual issue and second a legal issue, the factual issue being associated with the question whether the 24-month rule has discriminatory impact against spares at least and perhaps in some other way and the legal issue being whether Title 1 rights include protection against such a discriminatory impact of a rule of eligibility for office either on the ground that that in

itself is a Title 1 right or on the ground that the right of participation in the nomination process, nomination and voting process, is denied if an eligibility rule makes it essentially a worthless right.

[4] Now I am not ruling, you will understand, on either the legal question or the factual question. If the additional discovery would lead me to make fact findings that avoid that legal issue I would not need to reach the legal issue. It does seem to me the legal issue is a sufficiently troublesome one that it therefore makes more sense as a matter of the handling of this lawsuit expeditiously to address the discovery question first rather than addressing the legal issue first because after all, after I address the legal issue that will not firmly and finally settle it, however I may resolve it.

Now that leads me then to inquire of the parties what your positions are with respect to the question I have just raised. Is it not most appropriate for me today to enter an order vacating my stay of discovery and cause that discovery to proceed? I would be happy to be advised that my assessment that the possibility of some stipulation between you about the way of conducting the election is erroneous and you can reach some agreement but I am not expecting that and given that expectation I would like you to address the question whether I should not merely [5] lift the stay of discovery and have that completed before I hear you on whatever issues may arise as a result of the completion of the discovery with respect to the election.

Now I recognize that that will delay for a certain period of time whatever arrangements we might make about an election. It seems to me, however, that if the plaintiffs, who after all are the parties most severely harmed by the delay, if the plaintiffs are insisting upon their right to discovery recognizing that that necessarily will produce this potential for some delay in the election, that I would recognize their right to the discovery and make that the first step.

MR. STERN: On those points, your Honor, it does seem to me that our primary position with reference to the 24-month rule is not one that—it is that the Court may consider it as a Title 4 claim.

THE COURT: You are not taking the position that I can consider it as a Title 1 claim?

MR. STERN: No, we are taking that position. I said, I think, our primary position is that it's appropriate for the Court to exercise its discretion to consider it as Title 4 claim in [6] the circumstances and situation here where there were Title 1 claims that it is appended to and it would resolve the matter in a single proceeding. Since that is a matter of discretion I am somewhat tempted to throw the ball back in the Court's Court in a sense on the question of discovery to await the Court's position on the discretionary aspect of it. I believe we have a right to have the Court—

THE COURT: Well now, I'm not sure I am understanding you but I am not prepared to rule on any Title 1 assertion on your part with respect to the 24-month rule without the benefit of the discovery and whatever evidence may be produced before me. So unless you are telling me that you are prepared to waive that claim for the purpose of this preliminary relief at least, then I don't see how you can throw the ball back in my Court because I have got to have the product of that discovery and whatever evidence it produces before I am prepared to rule on the facts that would be essential to raising the Title 1 legal issue.

• • • •

[31] MR. WITLEN: Thank you, your Honor. The Court should be reminded as well as plaintiffs [32] should be reminded that the original complaint asks no more than that the local union conduct an election. Now the local union is willing to bring in a third party, an outside party. Obviously if a member of the local union executive board is also a representative of Joint Council 10 that local union representative will not be assigned by

the joint council to have any responsibility for conducting the election. The Teamster constitution reflects the requirements of due process that are set forth in the statute.

THE COURT: Well, in that respect I think it would be helpful if that is a part of the understanding with which you make the proposal that that be made clear in the stipulation so that—

MR. WITLEN: Defendants so stipulate, your Honor. It is so fundamental as to defy description. We are not attempting to defraud this Court by having the same people conduct an election by putting on a different hat and saying sorry, I am no longer Bart Griffith, Local Union 82 officer, I am now Joint Council 10 representative. But we will stipulate that none of the officials of Local 82 will have anything to do with the supervision provided by Joint Council [33] 10. The Teamster constitution provides in several places that members involved in charges or internal hearings cannot serve on trial panels. The statute requires such prohibitions. The cases which deal with the enforcement of the statute under Section 101(a)(5) are clear that merely by having one of the officers involved in a proceeding does not disqualify everyone else in the local union from participating in an internal union proceeding. This statute was designed to foster democratic procedures within the union and if every time a dispute arises within the union a Court takes it away from the union then those democratic procedures are never going to develop and a legion of cases can be cited for that proposition.

• • • •

February 20, 1981

[2] THE COURT: Good afternoon.

THE ATTORNEYS: Good afternoon.

THE COURT: Let me first advise you of some rulings I will make that will remove some of the issues that are addressed in your memoranda and then come to other issue that I want to discuss with you.

The defendants of course have objections on want of jurisdiction. I have considered those. They are denied. You also have objections of mootness, I suppose it might be called. Perhaps you argue jurisdictional, based upon your stipulations and based upon the Court's rejection of some of the plaintiff's requested relief. Those objections of the defendants are denied. It seems clear to me they lack merit. I am proposing—I have found violations of Title 1 rights and I am proposing to order some conditions beyond those to which the defendants have stipulated and I am thus finding that there are violations which your stipulations do not cure even apart from the question that if there were violations and you now [3] offer stipulations not to continue the violations that still would not deprive the Court of jurisdiction. Moreover, that applies as well to your argument that there is no basis for the preliminary relief proposed in paragraph 10 of the tentative order. Violations having been found, the Court has both jurisdiction and I think responsibility for granting the preliminary relief enjoining further violations. And that would be true even if you now proposed stipulation that was in all respects satisfactory.

But beyond that, because I find the stipulation does not go far enough it is plain to me the argument lacks merit. Likewise because I am rejecting plaintiff's requests in a number of respects I therefore lack jurisdiction plainly, it is an argument that the Court must either accept the plaintiff's position or the defendant's position and when the plaintiff has asked too much and the defendant has offered too little it is plain that the Court is not restricted to doing an injustice by selecting between the two untenable positions. The Court may instead order what it finds appropriate on the facts of the law it finds applicable to the case.

• • • •

[10] MR. WITLEN: Your Honor, I don't know whether you want to skip ahead to paragraph 9 but

I should advise the Court that not only does the general president have problems complying with that but also Joint Council 10 has problems.

THE COURT: I think it may be well for us then to go forward to that issue and address it.

Now by reason of the fact that I am proposing to order some conditions beyond those that were included in the stipulation it seems to me I must have some undertaking from any third party who is to conduct this election that it will be conducted in accordance with this order. Otherwise there is too much risk that we have very extensive future controversy about enforcement of the Court's order with possibilities of not one additional election but more if there were problems about it. It seems to me I must have an undertaking from anyone who is going to conduct the election that it be done in conformity with the Court's order. If it were being done by a party we would have it in effect by the appearance before the Court and the parties being bound by the Court's order. If we are having a third party do it, not a party to the litigation, that party [11] must be subject to the order of this Court to do it in accordance with the order of the Court and it seems to me the only way to accomplish that or at least the best way to accomplish it is by a formal undertaking by that party.

Now if Joint Council 10 is not willing to do that then it seems to me I have to hear the parties on what other arrangements to make and order some third party who is willing to make that undertaking to conduct the election.

Now I recognize that Joint Council 10 is not a party and therefore counsel are not in a position to speak for Joint Council 10 but if you tell me that Joint Council 10 appears not to be willing to make this undertaking then I think I must proceed to hear you promptly on what alternative arrangements the Court should consider for supervision of the election.

MR. WITLEN: Although I do not represent Joint Council 10, I am prepared to tell the Court that Joint

Council is not willing to undertake the responsibility or sign any document which might render it possibly liable to a contempt proceeding in this Court or any other type of proceeding in the event the election is run amiss for some [12] reason or another.

THE COURT: Then isn't it clear I must order somebody else to conduct the election who is willing to undertake to do it in accordance with the Court's order?

MR. WITLEN: We understand your position, your Honor, and unfortunately that's the Joint Council's position.

• • • •

[46] MR. WITLEN: The Court asked for us to [47] advise the Court as to whether in lieu of the changes to the proposed order the local union would wish to have reference made to the fact that many of the items in the order were derived from the local's stipulation and in view of the changes that are being made by the Court the local union would not like any reference to the fact that part of the order is derived from its proffered stipulation.

THE COURT: All right, I will remove that.

• • • •

February 27, 1981

[9] MR. WITLEN: At this stage of the proceedings the Defendant's stipulation that was ordered—that was offered in early January have effectively been withdrawn by the failure of the parties to agree that the stipulation is an adequate substitute per order of the Court.

THE COURT: Now, that I do not understand because I questioned you explicitly about whether it [10] was an offer of settlement or a binding stipulation. And I got the answer, "It is a binding stipulation."

MR. WITLEN: As offered, not as modified.

THE COURT: Well, all right, I understand that. One of the things that is very clear from that is that you have

stipulated that a new election would be conducted; that the election that was conducted to the nomination meeting of November 9, would not be longer asserted to be valid. Now, are you undertaking to withdraw that stipulation?

MR. WITLEN: If the local union is willing to stipulate to conducting an election under the terms set forth by the local union, that is, without the supervision and without an order being issued directing the local union to conduct an election in a certain manner.

THE COURT: Now, I want to be very clear about this. You presented to me an argument that you were making not an offer of settlement but a binding stipulation, and on the basis of that you argued that I lacked jurisdiction.

MR. WITLEN: That's correct, your Honor.

THE COURT: Now, you are undertaking to withdraw from that binding stipulation?

MR. WITLEN: The stipulation as offered we [11] are willing to stand by, but—

THE COURT: I think that you are simply putting the proposition that it was only an offer of settlement, and if not accepted according to its exact terms, then it was withdrawn. Now that is basically inconsistent with your contention that after you filed that stipulation, I lacked jurisdiction to proceed. I think that you are trying to withdraw from a binding stipulation you made when I made it very explicit. I want to know whether it is a binding stipulation or an offer of settlement? If it were only an offer of settlement, then the position that you are now taking would be appropriate. I got the other answer. It is not an offer of settlement, it is a binding stipulation, and on the basis of it, an assertion of lack of jurisdiction in this Court to order anything else. I have overruled that assertion. That does not give you an opportunity to withdraw a binding stipulation. If you wish to withdraw that binding stipulation, you are going to have to seek my permission and show good cause for doing so, otherwise I will not permit it to be withdrawn.

MR. WITLEN: Your Honor, if I could confer with co-counsel for a moment?

THE COURT: You may.

[12] MR. WITLEN: It's the Defendant's position that a stipulation was offered. And there were certain terms set forth in that stipulation. The terms for conducting the election have now been modified by the Court. While Defendants will stand by the initial stipulation, the Defendants are not willing to stipulate to the additional terms that are being required—

THE COURT: That I understand and I'm not suggesting that you are foreclosed in any way from contesting the Court's ordering of somewhat different terms than those you proposed in the stipulation.

MR. WITLEN: I think that we are now all in agreement, your Honor.

• • • •

[14] MR. STERN: They have stipulated to an election, so I assume that cost—

THE COURT: Excuse me. They have not stipulated to an election on the terms that I will order. And if my order should be overturned on an appeal, then the election that will have been conducted under my order will also be void as well as the previous election, which we have in effect have a stipulation, that is void. That would mean that whatever has been expended in conducting this election will have been lost. Is that not the kind of expense and loss that a bond, under Rule 65, is supposed to cover?

• • • •

[42] THE COURT: All right, now, if you wish me to do so, after I tell you the circumstances as I see them, I will allow the motion to amend the complaint. I will deny your request that I denied

• • • •

March 6, 1981

[118] THE COURT: All right. You may draft a proposal. Now let me make one other suggestion and invite

your reactions to it briefly if you wish to react at this point. If neither of the parties is able to present to me a proposal for [119] some third party to conduct the election that seems acceptable I will want to consider the appointment of a special master and I would inquire whether you wish to take positions on that question whether it's an appropriate thing for the Court to do at this point. I raise it because I want to move this along to final determination as quickly as possible and if the further proposal that the plaintiffs are expecting to present does not produce an acceptable proposal then I will want to move quickly to consider whether I should appoint a special master.

I am interested in the positions of the parties both with respect to whether that should be done and if so, whether you would wish to make recommendations as to who it should be or whether that matter should be handled entirely by the Court without consultation with the parties.

MR. STERN: I think for the sake of sufficiency and the Court simply doing that—that would be an acceptable method to us and the Court simply selecting and appointing someone would be satisfactory to my clients.

MR. WITLEN: Your Honor, it remains our position that the Court does not have the [120] authority to dictate the terms of the election. The union has stipulated to conduct an election under its terms and under its supervision so it would be a gross misrepresentation if we were to sit here and let you conclude from our silence that we were finding acceptable either the third party that Mr. Stern comes up with or the special master. We do not believe that the Court has the authority to order an election under these circumstances let alone to dictate the terms of the election.

THE COURT: That I understand but if I conclude, as I have done tentatively, that I should order an election, I am also offering you the opportunity to aid the Court in shaping the terms of that order, one factor among the

terms being who will supervise the election and I'm not asking you to waive your basic exception to the Court's ordering it but if you wish to make recommendations to the Court as to how the Court should proceed with respect to selection of the master if we come to that point then I welcome your comments.

MR. WITLEN: With that understanding, your Honor, defendants would represent that so [121] long as Mr. Stern and the Court do not come up with a member of the plaintiffs to supervise the election we are not going to have any objection to any person that is designated to run the election.

• • • •

PLAINTIFF'S EXHIBIT NO. 5

[Document Typed for Printing]

Nov. 9, 1980

Bart A. Griffiths
Secretary-Treasurer and
Business Agent
142 Robertson St.
Quincy, Mass. 02169

Executive Board Teamsters Local 82
142 Robertson St.
Quincy, Mass. 02169

Dear Gentlemen:

I'm today charging Robert Lunnin with:

1. Abuse of fellow members and officers in Meeting Hall.
2. Misconduct.
3. Action which is disruptive of, or interferes with the performance or obligations of members or Local Union and its officers.
4. Threatening harm and assault against Secretary-Treas. and Business Agent also family and property.

cc: Robert Lunnin
Executive Board
Mr. William J. McCarthy, President
Teamsters Joint Council 10

Reg. & Ret 652201

PLAINTIFF'S EXHIBIT NO. 6

[Local Union Letterhead Omitted In Printing]

Nov. 25, 1980

Robert Lunnin
761 East Sixth Street
South Boston, Mass. 02127

Dear Sir:

The following is the Executive Board Decision from the Trial of Nov. 24, 1980.

Charge No. One (1). The Executive Board fines you at fault and fines you one hundred and fifty dollars ($150.00) payable on or before Jan. 6, 1981, according to Article ninteen Section nine of the International Constitution.

Charge two and three. The Executive Board fines you at fault, and suspends you from attending Monthy Meetings for a period not less than two years effective Nov. 24, 1980. According to Trails and Appeals Article Ninteen.

The Executive Board Also wishes to inform you that you have the right to appeal this decision to the Joint Council No. 10, according to the International Constitution Article Ninteen Section Two.

Fraternally yours,

George Harris
Chairman of the Executive Board.

cc: L/C 82
J/C William McCarthy

Reg. Ret. (652205)

PLAINTIFF'S EXHIBIT NO. 23

[Local Union Letterhead Omitted in Printing]

Dec. 15, 1980

PLEASE POST

Notice to Members of C. Walsh

This letter is to inform you that Gerald Owens is not the Shop Steward for C. Walsh Movers.

Mr. Owens was removed from this position Dec. 15, 1980/

George Harris
President and
Business Agent

Bart A. Griffiths
Secretary-Treasurer
and Business Agent

PLEASE POST

PLEASE POST

PLAINTIFF'S EXHIBIT NO. 35

[Document Typed for Printing]

26

Monthly Meeting Oct. 12-1980

George Harris	015-28-7130
Bart A. Griffiths	029-38-6304
John J. Gately	030-32-6523
Richard J. Thompson	017-34-3685
Kevin M. Sullivan	029-34-5359
Gerald Patterson	031-42-4901
Philip V. Piemontese	029-28-4151
Jerry Crowley	016-32-6121
Joe Cook	022-48-4957
John Perry	015-42-4709
Jim Hayes	027-30-3282
Anthony J. Coyne	028-28-1893
Robert Lunnin	010-24-6452
John Early	380-16-1854
Michael J. Dowling	032-26-6781
Joe Scannell	018-22-1125
John Lynch	023-26-3976
Robert Byrnes	029-12-2978
Kenneth Sprague	010-24-6750
William Pye	014-48-1714
Joseph Crowley	091-14-2068
Coleman Halloran	031-30-8216

Oct. 12/1980

Warden Joe Crowley

PLAINTIFF'S EXHIBIT NO. 36

[Document Typed for Printing]

Nov. 24, 1980

Meeting was opened at 6:30 P.M.

Executive Board members present were

George Harris, President Business Agent,

Philip Piemontese, Vice President.

Paul Maquire, Trustee.

John Gately, Trustee.

Also present Bart Griffiths—Secretary Treasurer,

Robert Lunnin, Member, James Hayes member.

Bart Griffiths, charges Brother Lunnin charges with misconduct at Sept., Oct. Nov. meetings. Bart Griffiths appeals that Brother Lunnin act in an orderly Fashion at Future meetings. Charge No. 4 has been dropped by Brother Griffiths.

Kevin Sullivan, Member and Trustee appeared as witness for Brother Griffiths stated that Brother Lunnin acts disorderly at meetings and using abusive Language to executive board.

Brother Lunnin has stated his attendance of meetings for the past year and states that the executive board has not been Representing the members behalf. He states that executive board took away 40 hours from spares Health & Welfare *Brother Lunnin expresses his feelings* graphically.

Brother James Hayes, Member appeared as witness for Brother Lunnin.

Brother Hayes states that executive Board by-passes members. He states that *members are scared to speak*

out. He states that members are *afraid to come forth.* So Brother Hayes and Brother Lunnin are representative of such members.

Brother Robert Colburn, Eastern Transfer, member and shop steward appeared as witness For Brother Lunnin.

To Charge I he states Brother Lunnin did not abuse Fellow members and officers

To Misconduct charge he states everybody was out of order.

Testimony was closed and meeting was adjourned at 7:05 P.M.

Recorded by Philip Piemontese
Vice President,
Local 82
142 Robertson St.
Quincy Mass.

DEFENDANT'S EXHIBIT 47

[Local Union Letterhead Omitted In Printing]

Dec. 5, 1980

IMPORTANT ELECTION NOTICE

ANY MEMBER WHO HAS NOT RECEIVED A BALLOT, SHOULD CONTACT TEAMSTERS LOCAL 82-773-6793-4 for InQUIRES OF A NEW BALLOT.

TELEPHONE NUMBERS 773-6793
773-6794

Bart A. Griffiths
Secretary-Treasurer
and Business Agent

PLAINTIFF'S EXHIBIT NO. 54

[Joint Council Letterhead Omitted In Printing]

15 December 1980

Dear Sir and Brother:

Because of legal action pending in the United States District Court, the hearing, scheduled for Tuesday, December 23rd, 1980, on the matters listed below have been cancelled.

a) Protest by Brother James A. Crowley, jointly with five other members of Local 82, of the procedure of Nominations at Teamsters Union Local No. 82's meeting on Sunday, November 9th, 1980.

b) Appeal of Brother Robert E. Lunnin from a decision of the Executive Board of Teamsters Union No. 82 in the matter of charges against him relative to alleged misconduct at union meeting and alleged verbal abuse.

With best wishes, I am

Fraternally yours,

William J. McCarthy
President

copy: Mr. Jerome A. Crowley, et al., c/o Mr. Robert Lunnin, 761 East 6th Street, South Boston, MA 02127, Certified P20 3705905, return receipt requested.

Mr. Bart Griffiths, Secretary-Treasurer, Teamsters Local Union No. 82, 142 Robertson Street, Quincy, MA 02169, Certified P20 3705906, return receipt requested.

Supreme Court, U.S.
FILED
DEC 27 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-432

In The

Supreme Court of the United States

October Term, 1982

LOCAL NO. 82, FURNITURE AND PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN, AND PACKERS; BART GRIFFITHS, SECRETARY-TREASURER, LOCAL NO. 82; GEORGE HARRIS, PRESIDENT, LOCAL NO. 82; PHILLIP PIEMONTESE, CHAIRMAN OF THE ELECTION COMMITTEE OF LOCAL NO. 82; and JOHN DOE, JAMES DOE and JEROME DOE, MEMBERS OF THE ELECTION COMMITTEE OF LOCAL NO. 82,

Petitioners,

vs.

JEROME CROWLEY, ANTHONY COYNE, JOSEPH FAHEY, ROBERT LUNNIN, JAMES HAYES, GERALD OWENS, JOHN LYNCH, JOSEPH TRASK, JOSEPH MONTAGNA and DENNIS BATES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

MARK D. STERN
KURT M. PRESSMAN
GOLDSTEIN, PRESSMAN, STERN & HILLER
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LUTZ APPELLATE PRINTERS, INC.

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No. 82-432

In The

Supreme Court of the United States

October Term, 1982

LOCAL NO. 82, FURNITURE AND PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN, AND PACKERS; BART GRIFFITHS, SECRETARY-TREASURER, LOCAL NO. 82; GEORGE HARRIS, PRESIDENT, LOCAL NO. 82; PHILLIP PIEMONTESE, CHAIRMAN OF THE ELECTION COMMITTEE OF LOCAL NO. 82; and JOHN DOE, JAMES DOE and JEROME DOE, MEMBERS OF THE ELECTION COMMITTEE OF LOCAL NO. 82,

Petitioners,

vs.

JEROME CROWLEY, ANTHONY COYNE, JOSEPH FAHEY, ROBERT LUNNIN, JAMES HAYES, GERALD OWENS, JOHN LYNCH, JOSEPH TRASK, JOSEPH MONTAGNA, and DENNIS BATES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

Respondents, Jerome Crowley, Anthony Coyne, Joseph Fahey, Robert Lunnin, James Hayes, Gerald Owens, John Lynch, Joseph Trask, Joseph Montagna, and Dennis Bates, respectfully oppose petitioners' petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the District Court for the District of Massachusetts is officially reported at 521 F. Supp. 614, and is reprinted in Appendix A, pp. 1a-40a. The opinion of the United States Court of Appeals for the First Circuit has been reported at 679 F. 2d 978 and is reprinted in Appendix B, pp. 41a-93a.

STATEMENT OF THE CASE

A. Statement of Facts

The respondents adopt and incorporate herein the findings of facts of the District Court in this case (Appendix, pp. 17a-21a), and further add the following.

First, the District Court made reference to the "uproar among those [members] assembled outside the meeting" (Appendix, p. 18a) who claimed that the incumbents were imposing a new requirement for admission to the nominations meeting. In fact, as petitioners conceded at the District Court hearings on the preliminary injunction, in response to this new requirement all the members present other than the incumbent officers refused to enter the meeting room for nearly one hour. Finally, petitioner Griffiths asked the members in the hallway to send in a delegation, led by one of the respondents, to negotiate with the petitioners about this issue (*see* Court of Appeals decision, Appendix, p. 43a).

Second, the District Court found that, once the meeting began, Griffiths first read off a list of twelve "ineligible" candidates, which included four of the most vocal respondents (among them, James Hayes), and then Griffiths read off a list of sixteen "eligible" candidates, which included the three petitioners incumbent officers and a number of their supporters (Appendix, p. 20a). In fact, respondent James Hayes, whose name was read off as ineligible, was at trial conceded by Griffiths to have been eligible at the time.

A final important fact is that several days after the nominations meeting, respondent Lunnin received notice that Griffiths had filed disciplinary charges against him for his alleged "misconduct" during the nomination meeting. After a hearing before the Local 82 Executive Board, on which sat respondents Harris and Piemontese, Lunnin was fined $150 and prohibited from attending union meetings for two years. Lunnin appealed this decision within the union to Joint Council 10 of the Teamsters Union. No action was taken or hearing held on this appeal until January 15, 1981. At that time, after the hearings on the motion for preliminary injunction had ended and the petitioners had unilaterally agreed to run a new election, petitioners' counsel informed the court that the Joint Council had overturned this discipline (Appendix, p. 6a, note 6).

B. Proceedings Below

On December 1, 1980, respondents filed a complaint and motion for preliminary injunction against the petitioners in federal district court. The original complaint contained nine separate claims that the petitioners had violated the following rights of the respondents in violation of Sections 101(a)(1), (2), and (5) of Title I of the Labor Management Reporting and Disclosure Act of 1959 (hereinafter "the Act" or "LMRDA"), 29 U.S.C. §411(a)(1), (2) and (5): their equal right to nominate candidates;

to attend and participate in the union's nomination meeting; to express their views freely about union business; and to be free from unlawful discipline. The complaint also contained a claim that one of the union's eligibility requirements was unreasonable and discriminatory, in violation of Title IV of the Act, 29 U.S.C. §481(e). These claimed violations occurred prior to, at, and subsequent to the November 9, 1980 nomination meeting.

On December 12, 1980, the District Court granted a temporary restraining order barring the petitioners from collecting or counting the ballots. The court conducted five days of evidentiary hearing on the motion for preliminary injunction, concluding on December 31st.

On January 9, 1981, prior to the issuance of any decision by the District Court on the evidence heard, the petitioners notified the court in writing that they had changed their position and were now prepared to hold a new nomination meeting and mail-ballot election. In this letter petitioners stated that this stipulation would substantially satisfy the respondents' request for preliminary injunction (with the exception of the respondents' challenge under Title IV to the above-noted eligibility requirement).

The petitioners at several times reiterated that they considered these unilateral stipulations binding upon them and were not mere offers of settlement (Appendix, p. 4a, note 4). On January 15 and 22, 1981 the petitioners filed further binding stipulations setting forth the procedures by which they would conduct the new nominations meeting and election, subject to the District Court's approval.

On January 31, 1981 respondents filed a motion to amend their complaint to conform to the evidence presented. This motion was granted and a hearing was held on March 6, 1981 to allow both sides to present any other evidence they desired.

During the months of January, February, March, and April, there were a number of hearings which dealt with the petitioners' stipulations to run a new election, respondents' objections to certain matters not being included in the new election process, and the efforts of both parties to refine the details of the new election by agreement. At a hearing on January 23, 1981 the petitioners further stipulated that none of the officials of petitioner Local 82 would have anything to do with the supervision of the election, which they had proposed to be run by Joint Council 10, an intermediate body of the teamsters union comprised of members of local teamsters unions in the New England area.

On February 12, 1981, the court issued a proposed order for the conduct of a new election. This proposed order was virtually identical to the stipulations filed by the petitioners, with the exception that the party conducting the election would have to file an undertaking with the court agreeing to conduct the election in accordance with the terms of the order. The proposed order also contained a provision enjoining the individual petitioners from violating Title I of the Act, and a requirement that the notice of the new election process be sent to union members containing a statement referring to the court proceedings. Subsequently, on February 20, 1981, petitioners informed the court that Joint Council 10 was *not willing* to conduct the election if it were to be supervised by the District Court (Appendix, p. 38a).

The District Court requested that the parties suggest and attempt to agree upon a third party to supervise the election. The petitioners made no suggestions regarding such a third party. The respondents, after substantial inquiry, proposed a third party (the third party ultimately appointed as arbitrator by the court), and the petitioners stated that they had no objection to this third party.

On July 13, 1981, the District Court issued its preliminary injunction and memorandum. The preliminary injunction is

identical to its February 12, 1981 proposed order, with the exception of the designation of the outside arbitrator and certain provisions necessitated by the fact that a non-union third party would supervise the election process. None of these modifications substantially changed the order proposed on February 12, 1981.

In its memorandum accompanying its preliminary injunction, the District Court concluded that it had jurisdiction over respondents' claims of discrimination and free speech under Title I of the Act, but that it lacked jurisdiction over their Title IV claim regarding the reasonableness of the challenged eligibility requirement (Appendix, p. 13a). The court went on to find that both before and during the November 9, 1980 nominations meeting, petitioners Griffiths and Harris deliberately attempted to deny the respondents the rights under Title I to nominate candidates, to attend membership meetings, to participate in the deliberations of such meetings, to meet and assemble freely with other members, and to express their views openly (Appendix, p. 21a).

The First Circuit Court of Appeals affirmed the District Court's decision. After an extensive review of the legislative history that led to the adoption of the Act, that court found this history "does not suggest that Congress sought to oust the federal courts of jurisdiction over [Title I] complaints involving union elections. . . . [T]here is no evidence that limitations on Title I by Title IV were ever contemplated" (Appendix B, pp. 58a-59a). The court further concluded that the respondents had alleged legitimate Title I claims in their complaint (Appendix, p. 60a), and that an election is not "already conducted" for purposes of Section 403 of Title IV, 29 U.S.C. §483 until all the ballots are counted.

As to the petitioners' attack upon the scope of the District Court's preliminary injunction, the Court of Appeals concluded

that the District Court had constructed an order that was as close as possible to the petitioners' stipulations, and that the two specific provisions to which the petitioners objected did not in any way impair the status quo (Appendix, p. 74a).

REASONS FOR DENYING THE WRIT

I.

INTRODUCTION

A petition for certiorari must meet the criteria set forth in Supreme Court Rule 19. In the instant case petitioners and the federal respondent Secretary of Labor contend both that the Court of Appeals (1) "has rendered a decision in conflict with the decision of another Court of Appeals on the same matter; [and (2)] has decided a federal question in a way in conflict with applicable decisions of this Court." Supreme Court Rule 19(1)(b).

It is well established that conflict under Rule 19 must be demonstrated to be "square and unreconcilable" and not merely an inconsistency in dicta or in the general principles utilized.[1] No such conflict as to any aspect of the lower court's decision herein has been demonstrated by either petitioners or the federal respondent.

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1. *Layne and Bowler Corp. v. Western Well Works*, 261 U.S. 387, 392-3 (1923); *Keller v. Adams-Campbell Co.*, 264 U.S. 314 (1924); *Wisc. Electric Co. v. Dunmore Co.*, 282 U.S. 813 (1931); *see also*, former Rule 38(5)(b) from which the word "probably" was deleted in adopting Rule 19(1)(b).

II.

THE DECISION OF THE COURT OF APPEALS THAT TITLE IV OF THE ACT IS NOT THE EXCLUSIVE REMEDY FOR AND DOES NOT PREEMPT TITLE I WITH REGARD TO TITLE I PRE-ELECTION VIOLATIONS IS CONSISTENT WITH THE LANGUAGE OF THE STATUTE, THE LEGISLATIVE HISTORY, AND DECISIONS OF THIS COURT AND THE VARIOUS CIRCUIT COURTS.

A. The Express Language of the Act and its Legislative History Establish That Title IV Was Not Meant to Preempt Title I With Regard to Legitimate Title I Pre-Election Violations.

It is the initial contention of both the petitioners and the Secretary of Labor that Title IV of the LMRDA is the exclusive remedy for any and all election-related complaints of union members, even for complaints that allege legitimate Title I violations, regardless when such violations occur. The language of the Act, however, does not so provide.

Title I of the LMRDA, the so-called union members' "Bill of Rights", expressly guarantees, in part, union members' equal rights and privileges to nominate candidates for union office, to vote in union elections, and to attend union meetings, subject to reasonable rules and regulations, 29 U.S.C. §411(a)(1). Title I also explicitly provides that federal district courts have jurisdiction to remedy violations of Title I, including issuing injunctions. 29 U.S.C. §412. Nothing in Title I limits a district court's jurisdiction to remedy Title I violations involving discrimination in the right to nominate candidates, vote and attend nominations meetings.

Title IV of the Act also deals extensively with union elections. While 29 U.S.C. §483 states that "[t]he remedy provided by this

subchapter for challenging an election *already conducted* shall be exclusive" (emphasis added), nothing in that provision or anywhere else in the Act states that Title IV is the exclusive remedy for *pre-election* violations.

The legislative history of the Act likewise does not support such a contention. The Court of Appeals in its decision carefully and at length analyzed and recounted the legislative history that led to the enactment of the Act (Appendix, pp. 53a-59a); such an analysis need not be repeated here. Respondents would, however, emphasize the Court of Appeals' conclusion:

> This history suggests that Congress intended the Secretary to have considerable responsibility for examining union elections, but it does not suggest that Congress sought to oust the federal courts of jurisdiction over complaints involving union elections. The exclusiveness of the Title IV remedy in certain cases was intended to exist only vis-a-vis state remedies; there is no evidence that limitations on Title I by Title IV were ever contemplated (Appendix, pp. 58a-59a).

B. There Is No Conflict Between the Decision Below and the Decisions of This Court With Regard to the Jurisdiction of a District Court to Provide a Remedy For Legitimate Election-Related Violations of Title I of the LMRDA.

Petitioners have failed to cite a single decision of this Court or any court of appeals wherein an election-related violation of Title I was found, and despite that, it was held that the court lacked jurisdiction or statutory authority to enjoin and supervise the conduct of a rerun election. Despite an assertion to the contrary, neither has the federal respondent (Federal Respondent's Brief at pp. 9-10).

Petitioners rely on the case of *Calhoon v. Harvey*, 379 U.S. 134 (1964) and two recent decisions of this Court[2] for the proposition that the decision of the First Circuit Court of Appeals herein is "at odds with" the decisions of this Court. However, this Court based its decision in *Calhoon* on its determination that no legitimate Title I violation was found to have occurred therein. The Court in *Calhoon* ruled that "the equal-rights language of §101(a)(1) would have to be stretched far beyond its normal meaning to hold that" it applied to the facts of that case. 379 U.S. at 138.

The two most recent pronouncements of this Court upon which petitioners rely — *U.S.W.A. v. Sadlowski*, 50 U.S.L.W. 4626 (1982) and *Finnegan v. Leu*, 50 U.S.L.W. 4480 (1982) — serve the union member respondents' assertions far better than they do petitioners.

In *Sadlowski, supra*, this Court reaffirmed its prior recognition that the provisions of Title I apply to the conduct of union elections and not simply to the exercise of rights unprotected under Title IV of the Act. 50 U.S.L.W. at 4629 and at 4632. As Justice White stated in the minority opinion:

> What Congress then did was to guarantee the union member's right to run for election, §401(e), and to guarantee him freedom of speech and assembly. §101(a)(2). *There is no question, and the Court concedes as much, that the Act created statutory protection for the union member's right effectively to run for union office. Without doubt,* §101(a)(2) was not only aimed at protecting the member who speaks his mind on union affairs, even if critical

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2. The federal respondent relies only on the *Calhoon* decision.

> of the leadership, but *was also "specifically designed to protect the union member's right to seek higher office within the union." Hall v. Cole,* 412 U.S. 1, 14 (1973).

(Emphasis added.) 50 U.S.L.W. at 4632.

Petitioners point, however, to the fact that the Court majority in *Sadlowski* notes, as often this Court has, that Congress intended to impose through Title IV only "minimum standards" after which unions are free to run their own elections. 50 U.S.L.W. at 4630. Petitioners, citing several other decisions of this Court in which this general principle has also been enunciated, construe this principle to be a rigid mandate that a district court may never fashion a remedy that impinges upon an internal union election, even if clear Title I violations are found to have occurred (Petition, p. 14).

However, the *Sadlowski* decision and the language of Title I show that the members of the Court do not concur in such a rigid view. For, as noted in Justice White's dissent, despite recognizing that Title IV of the Act addressed the subject matter of "contributions" to candidates for union office, the entire *Sadlowski* Court agreed that Title I rights applied to procedures governing the election of union officers. 50 U.S.L.W. at 4632.

In *Finnegan, supra,* also, and in this Court's denial of certiorari in *Navarro v. Gannon,* 385 F. 2d 512 (2nd Cir. 1967), *cert. denied,* 390 U.S. 989 (1968), this Court implicitly recognized the authority of a district court, on a union member's complaint, to enjoin an election proceeding where both Title I and Title IV rights have been abridged as "part of a purposeful and deliberate attempt by union officials to suppress dissent within the union." *Finnegan,* 50 U.S.L.W. at 4482 [quoting from *Schonfeld v. Penza,* 477 F. 2d 899 (2nd Cir. 1973)]. The decision in *Finnegan* does

not, in referring to *Schonfeld,* suggest any disagreement with the distinction drawn therein between *Calhoon* and cases, like the instant one, which the District Court below found to concern "discrimination and free speech claims that defendants applied [a] . . . rule in a discriminatory fashion in retaliation for plaintiffs' exercise of their right to speak freely." (Appendix, p. 13a).

C. The Decision of the Court of Appeals Below is Consistent with the Decisions of Other Circuit Courts with Regard to the Authority of a District Court to Fashion Appropriate Remedies for Election-Related Title I Violations.

The First Circuit Court of Appeals, in upholding the jurisdiction of the District Court in this case to enjoin the union election and to order that a new election be conducted under its supervision, relied upon five decisions from other courts of appeal which came to the same conclusion.[3]

Despite these circuit court decisions the petitioners contend:

> The courts have consistently respected the Secretary of Labor's authority where the remedy requested would have required the district court to supervise the details of the union election (citations omitted) (Petition, at p. 16).

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3. *Schonfeld v. Penza, supra; Kupau v. Yamamoto,* 622 F. 2d 449 (9th Cir. 1980); *McNeil v. Amalgamated Meat Cutters and Butcher Workmen of North America,* 459 F. 2d 538, 540-51 (8th Cir. 1977); *Depew v. Edmiston,* 386 F. 2d 710 (3rd Cir. 1967). *See also, Bunz v. Moving Picture Machine Operators, Local 224,* 567 F. 2d 1117, 1120-24 (D.C. Cir. 1977).

In fact, neither of the two cases they cite for this proposition dealt with Title I violations.[4] In *Robins v. Rarback*, 325 F. 2d 929 (2nd Cir. 1963), *cert. denied*, 379 U.S. 974 (1965) the court relied on its having found that "the plaintiff has not been denied the right to vote and makes no claim based on any such denial." 325 F. 2d at 930. What it stated thereafter was dictum only, as the lengthy concurrence notes. 325 F. 2d at 931-4.

Furthermore, as noted in *Bunz v. Moving Picture Machine Operators*, 567 F. 2d 1117 (D.C. Cir. 1977), the Second Circuit Court of Appeals has three times subsequent to its decision in *Robins, supra*, not consistently followed the "narrow approach to the 'equal right to vote' " pronounced in dictum therein. The Third Circuit has likewise rejected that approach altogether. *Sabolsky v. Budzanoski*, 457 F. 2d 1245, 1251 (3rd Cir. 1972).

In *Driscoll v. Operating Engineers Local 139*, 484 F. 2d 682 (7th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974) the court also found, contrary to the federal respondent's assertion, that no violation of Title I had been alleged.[5] 484 F. 2d at 689.

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4. Likewise, no Title I violations were found in *Colpo v. General Teamsters Local 326*, 5[illegible]0 F. Supp. 573 (D. Del. 1980), cited by petitioners, and *Venet v. Local Union 606, United Brotherhood of Carpenters and Joiners of America, Virginia, Minnesota*, 342 F. Supp. 819 (D. Minn. 1972), cited by federal respondent. Indeed *Venet, supra*, is totally inapposite, since the court therein found no pre-election violations of any kind, Title I or IV.

5. It should also be noted that the complaint in *Driscoll, supra*, concerned an alleged violation in an election that had concluded four years prior to the District Court's dismissal of plaintiffs' suit. 484 F. 2d at 684 and 688, footnote 11.

The court therein noted:

> Thus, *Calhoon* requires analysis of the substance (379 U.S. at 138, 85 S. Ct. 202) and basic nature (*Id.* at 141, 85 S. Ct.

(Cont'd)

In fact, as the Ninth Circuit Court of Appeals held in *Kapau v. Yamamoto, supra,* where a violation of Title I has been found, the courts have not consistently deferred to the Secretary of Labor, but rather have exercised jurisdiction over the claim. 622 F. 2d at 455[6]. The court noted:

> In each of these cases the Court upheld relief under Title I despite the fact that the plaintiffs could have sought some relief pursuant to Title IV.
>
> We believe that the better view of the relationship between Title I and Title IV remedies is that espoused in *Depew v. Edmiston,* 386 F. 2d 710 (3rd Cir. 1967), where the court held that *the crucial inquiry is whether a union member has been discriminated against in the exercise of his Title I rights. If so, then "regardless of other claims" his Title I cause of action is not preempted* by the existence of Title IV claims.

622 F. 2d at 455. (Emphasis added.)

(Cont'd)

> 292) of the complaint in order to determine whether jurisdiction exists. Such an approach was employed in *Schonfeld v. Penza,* 477 F. 2d 809 (2nd Cir. 1973).

484 F. 2d at 687, at footnote 6.

6. *See also, Bunz, supra; Pignotti v. Local No. 3 Sheet Metal Workers International Association,* 343 F. Supp. 236 (D. Neb. 1972), *aff'd,* 477 F. 2d 825 (8th Cir.), *cert. denied,* 414 U.S. 1067 (1973); *Stettner v. International Printing Pressmen,* 278 F. Supp. 675 (E.D. Tenn. 1967); *Rolleson v. Hotel Employees, Local 879,* 677 F. 2d 741 (9th Cir. 1982) and *Libutti v. DiBrizzi,* 337 F. 2d 216 (2nd Cir. 1964).

III.

THE SCOPE OF THE PRELIMINARY INJUNCTION ISSUED BY THE DISTRICT COURT WAS PROPER AND NOT AN ABUSE OF ITS DISCRETION, AND DOES NOT RAISE A JURISDICTIONAL ISSUE.

In their "Questions Presented for Review" and in their argument, the petitioners focus, as the fundamental issue, on the fact that the District Court ordered the union to conduct an election of officers under the supervision of third parties not associated with the union, utilizing rules and procedures prescribed by the District Court (Petition, pp. i, 9-10).

To the extent that the petitioners are attacking the scope and terms of the preliminary injunction, this case raises no new or difficult issues of law and does not merit review by this Court. It is well-established that the scope of interlocutory review of an order granting or denying a preliminary injunction is narrow and that such an order will not be disturbed unless clearly erroneous or an abuse of judicial discretion. *Meccano, Ltd. v. John Wanamaker*, 253 U.S. 136 (1920); *Prendergast v. N.Y. Telephone Co.*, 262 U.S. 43, 50-51 (1923).

The District Court in this case found that the petitioner union officers had deliberately attempted to deny the respondents their rights under 29 U.S.C. §411(a)(1) and (2) (Appendix, p. 21a). For the District Court in such circumstances to then require that the election be conducted under the court's monitoring and supervision was not clearly erroneous or an abuse of discretion.

Moreover, petitioners' contention is totally disingenuous and particularly groundless in light of the fact that the petitioners had

unconditionally stipulated[7], prior to the District Court rendering any decision, that the first election was void, that a new election should be held, and that none of the petitioner officers of Local No. 82 would have any role in the conducting of the new election (*see* Exhibit A, appended hereto, Transcript of January 23, 1981 Hearing, pp. 530-531). The petitioners subsequently informed the court that, contrary to their earlier representations and expressed desires, Teamsters Joint Council 10 would not agree to conduct the new election under order of the court, because it did not want to be "possibly liable to a contempt proceeding" in the event that the election was "run amiss for some reason or other" (Exhibit B, appended hereto, Transcript of February 20, 1981 Hearing, pp. 536-538).

At no time did the District Court ever rule that either the petitioner Local No. 82 or Teamsters Joint Council 10 were barred from conducting the election. Indeed, until Joint Council 10 refused to conduct the election, the District Court appeared to favor Joint Council 10 running the new election (Exhibit B, p. 537, lines 6-10). Only after that union body refused to supervise the election did the court request that the parties agree upon an acceptable third party.

As to petitioners' objections to the content of the District Court's order — that the court ordered a new election "in a different form or manner than is required by [the union's] own constitution or bylaws," — the Court of Appeals correctly noted that the District Court "constructed a preliminary injunction that effected as little change as possible from terms which defendants found acceptable," and that the two paragraphs to which the

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7. The petitioners initially expressed their position as an *unconditional* stipulation, not an offer of settlement, and later expressly reiterated that position (Appendix, p. 4a).

defendants objected had nothing to do with maintaining the status quo (Petition, p. 9; Appendix, p. 74a).

Furthermore, the federal respondent's citations of law on this point do not stand for the propositions he asserts in his brief (Federal Respondent's Brief, at pp. 11-12).

IV.

THERE IS NO CONFLICT BETWEEN DECISIONS OF THE COURTS OF APPEALS AS TO WHETHER AN ELECTION IS "ALREADY CONDUCTED" WHEN ALL BALLOTS MAY NOT HAVE BEEN RECEIVED AND NO BALLOTS HAVE BEEN COUNTED.

The petitioners argue that there is a conflict between the decision of the appeals court in this case, and the decisions of the Second, Third and Sixth Circuits, as well as decisions of three district courts[8]. A review of these decisions reveals no such conflict among their holdings.

In the instant case, the Court of Appeals held that an election was not "already conducted" until completed. The appeals court found:

> On December 12th, in order to preserve the status quo and to protect its own jurisdiction, the district court issued a temporary restraining order preventing the Local from counting (and even picking up) the ballots, *some of which had already*

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8. The federal respondent relies only on the decisions of the Third and Sixth Circuits and relies on a different, fourth decision of a district court.

> *been received* (Appendix, p. 46a). (Emphasis and parenthetical amplification added.)

The court below drew the line for a "completed" election as the time "the ballots have been counted" (Appendix, p. 67a). The court in essence decided first that "conducted" did not mean merely "commenced", but "completed", and then determined at what point an election is "completed"[9].

In *McDonough v. Local 825 Operating Engineers*, 470 F. 2d 261 (3rd Cir. 1964), the court found that "balloting has been completed" where all the ballots had been cast and counted, though not yet certified. It held:

> It is a reasonable interpretation of sec. 483 to hold that an election had been conducted once balloting has occurred. Cf. *Libutti v. DiBrizzi*, 337 F. 2d 216 (2nd Cir. 1964). This comports with a literal reading of "conducted" as well as with a reading that adheres to Congressional policy.

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9. As to the first part of its two-part determination — that "conducted" does not mean merely "commenced" — neither the petitioners nor the federal respondent contend that the court either erred or, in so ruling, conflicted with any other circuit court's decisions. Nor reasonably speaking, could they have so argued consistent with the principles recognized in *Sadlowski, supra*, and the self-evident intent of Congress in making Title I safeguards applicable to elections and enforceable through §102. For if "conducted" were synonymous with "commenced", and Title IV, the sole remedy for elections commenced, then the protections of Title I applicable to union elections could never be enforced under §102.

Notwithstanding both petitioners' and the federal respondent's contentions to the contrary, the cases cited by them are not truly in conflict with the instant one.

> To say, as the district court did, that the election is not completed until the result is certified would set up a race to the court house since it is difficult to believe that any complaining party would choose to wait until a result had been finalized to bring suit because he would then have to use secs. 481-483. Cf. *McGuire v. Grand International Division of Bros. of Local Engineers,* 426 F. 2d 504, 508 (6th Cir. 1970). 470 F. 2d at 264.

The respondents do not believe the court in the above-quoted statement equated "conducted" with "begun"; if, however, it did, its statement to that effect would be dicta and dicta only.

The *McDonough* court's reference to *Libutti v. DiBrizzi,* 337 F. 2d 216 (2nd Cir. 1964) may have confounded petitioners who assert: "The Second Circuit has found Title IV jurisdiction to extend over practices occurring 'subsequent to the nomination and voting' " (citations omitted) (Petition, at p. 18). While it may be the case that after an election has been completed, the Secretary has Title IV jurisdiction to investigate violations that occurred at *any* point in the election process, that neither is the issue at hand, nor was it the issue in *Libutti, supra.* Indeed, the Second Circuit found therein that Title I had been violated by the union's disqualification of candidates nominated for office, and affirmed the District Court's issuance of an order enjoining an election's going any further without correcting such violation.

Also, contrary to petitioners' contentions, *Lawrence v. Utility Workers Union of America,* 509 F. Supp. 1151 (N.D. Ohio 1981) and *McGuire v. Grand International Division of Bros. of Local Engineers,* 426 F. 2d 504 (6th Cir. 1970) dealt solely with complaints filed long after the votes had been tabulated. In both cases, the courts determined that the allegations of Title I violations therein were, as in *Calhoon,* merely attempts to dress Title IV

violations in Title I clothing. As such, neither holding conflicts with the holding in the instant case.

V.

THE FEDERAL RESPONDENT'S SUGGESTION THAT THE COURT BELOW SHORT-CIRCUITED THE EXPEDITIOUS RESOLUTION OF THE INSTANT CASE IS WITHOUT MERIT.

The federal respondent asserts that by the action of the court below:

> The Secretary's expertise in the conduct of elections is then entirely cast aside. *The delay that can result* is typified by the sequence in this case: the election nullified on December 12, 1980 was not rerun until exactly *one year* later (Pet. 18 n.39). A hearing to review the conduct of the nominations meeting, undertaken by Teamsters Joint Council 10, was cancelled when this action was filed (Pet. App. 15a-16a). Review of respondents' claims and the possibility of extra-judicial *resolution by the Secretary was short-circuited.* (emphasis added) (Federal Respondent's Brief, at p. 12).

The first of these suggestions regarding Joint Council 10 strains credulity. The only entity that prevented the Joint Council or the Secretary from reviewing the electoral process was the petitioner union by stipulating to rerun the election *before* either addressed the matter. The Joint Council took action to vacate the discipline of respondent Lunnin a full month after the court issued its restraining order impounding the election ballots; it could have vacated the electoral process as well, had it so desired. Instead, Joint Council 10 on its own initiative cancelled the hearing

scheduled for respondent's protest of the election (Appendix, p. 15a).

Likewise, if as contended herein the federal respondent believed the election was completed as of December 12, 1980, the Department of Labor could have taken action to correct the electoral abuses and schedule a Department-supervised rerun election any time prior to July 13, 1981. That he did not belies the federal respondent's assertion that the Court interfered with his speedily remedying the situation in the petitioner Local 82. The fact is that the Secretary never believed this election had transpired until he filed a motion to intervene just prior to this case's being argued before the Court of Appeals.

The suggestion that the one year the process below took in total was a delay that would have been avoided had this case followed the Title IV route is nothing short of disingenuous. According to the 1969 statistics published in Appendix D to one of the very law review articles upon which the federal respondent relies, the Secretary's average time for settled cases was 2 years, 1.6 months, and for court-decided cases 2 years, 6.7 months. *Note: Union Elections and the LMRDA: Thirteen Years of Use and Abuse,* 81 Yale L.J. 407 (1972), at p. 573.

Since, as the federal respondent states, elections are required to be conducted at least triennially, the one year lapse herein contrasts most favorably with the several years delay involved in cases handled by the Secretary. The contrast between these time-lapses proves, where a union election is conducted with no regard for the Title I rights of union members and remedied after the fact by the Secretary, the wrong-doers remain in office on average for between 71% and 84% of the term for which they were never lawfully elected; where Title I rights are vindicated by pre-election relief granted by the courts, union members live under the jurisdiction of lawfully elected officials for the entirety

of the following term of office.[10] There is no more compelling argument for pre-election, court-ordered relief under Title I than this! Hence the aforementioned comment notes:

> Most significantly, it is argued that the remedy comes too late in the Title IV enforcement process. The average time between the contested election and the completion of the rerun, assuming no appeal beyond the district court, is two years and seven months. As would be expected, complainant attorneys unanimously indicated that *litigation under Title IV was ineffective due to this delay.* But a substantial portion of union attorneys concurred, and even more significantly, DOL filed staff members also considered the enforcement mechanism ineffective because of the substantial delays. *Delay undoubtedly works to the advantage of the incumbent.* If a rerun were held promptly after the contested election, the abridgement of democratic procedures might itself become an issue in the subsequent election. But the passage of time and the low profile of DOL supervision make it unlikely that the rerun campaign will focus on this issue. Rather, the incumbent's performance during his time in office will be the more likely subject of debate. If the incumbent has performed well, the membership may re-elect him even though his incumbency is the fruit of unlawful conduct in the original election.

---

10. The previously lawfully elected officials remain in office for the first year and subsequently lawfully elected ones for the remainder of the term.

> *Delay robs the rerun device of both remedial and deterrent objectives.* . . . The deterrence aspect of the rerun device is further impaired by the approach employed by the Department in supervising the election, which generally fails to take account of the widespread ignorance of the provisions of the Act among the rank and file and their willingness to tolerate less than fair procedures. . . .
>
> *The inadequacy of the rerun device is shown most clearly in its utter failure as a means of disciplining conscious attempts to subvert democratic procedures to gain office.* When such tactics succeed, the unscrupulous candidate will nevertheless spend an average of over two and one half years in office. While he may hold that office under an aura of illegitimacy, he will nevertheless have at his disposal the union's communications resources and the opportunity to justify his incumbency by performance. The losing candidate, particularly if he is part of a wider insurgent movement, faces the gradual fragmentation of his support and possible harassment and intimidation of himself and his supporters (emphasis added).[11]

To further suggest as federal respondents do, that the "enforcement scheme set out in Section 402 (29 U.S.C. §482) could have been immediately implemented "had the district court not intervened" belies the fact that that "immediate"

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11. 81 Yale Law Journal, at 523-526. *See also*, 78 Harvard Law Rev. 1617, at 1633-34 (1965); and 13 Harvard Civil Rights — Civil Liberties Law Rev. 247 at 299 (1978).

implementation would not have begun for at least three months thereafter and would on the average take more than two years thereafter to resolve, and longer if appealed (Federal Respondent's Brief, p. 12).

To raise additionally the spectre of 53,000 lawsuits every three years, as federal respondents do, without noting that as of the end of 1969 the Secretary had only brought 177 in the first ten years of the Act's operation is equally disingenuous [Appendix B to 81 Yale Law Journal 407, 572 (1972)].

Finally, the Secretary inaccurately asserts that the delay in this case is "typical" of what would occur in future cases. A substantial reason for the lapse of time between the petitioners' stipulation to run a new election in January, 1980, and the District Court's preliminary injunction in July, 1980, was related in part to respondents' injection of a new claim regarding the validity of prior dues collected by the petitioners and in part by the search for a third party to supervise the election, after Joint Council 10 refused to supervise it under the terms of the court's order.

CONCLUSION

For the above reasons and the additional reason that this action will be wholly moot before this Court is likely to decide the merits of the instant petition[12], the petition should be denied.

Respectfully submitted,

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12. The next regularly scheduled election in the petitioner Local Union must be held in the fall of 1983.

EXHIBIT A — EXCERPTS OF TRANSCRIPT OF JANUARY 23, 1981 HEARING

[Commencing at page 530]

* * *

should be reminded that the original complaint asks no more than that the local union conduct an election. Now the local union is willing to bring in a third party, an outside party. Obviously if a member of the local union executive board is also a representative of Joint Council 10 that local union representative will not be assigned by the joint council to have any responsibility for conducting the election. The Teamster constitution reflects the requirements of due process that are set forth in the statute.

THE COURT: Well, in that respect I think it would be helpful if that is a part of the understanding with which you make the proposal that that be made clear in the stipulation so that —

MR. WITLEN: Defendants so stipulate, your Honor. It is so fundamental as to defy description. We are not attempting to defraud this Court by having the same people conduct an election by putting on a different hat and saying sorry, I am no longer Bart Griffith, Local Union 82 officer, I am now Joint Council 10 representative. But we will stipulate that none of the officials of Local 82 will have anything to do with the supervision provided by Joint Council [531] 10. The Teamster constitution provides in several places that members involved in charges or internal hearings cannot serve on trial panels. The statute requires such prohibitions. The cases which deal with the enforcement of the statute under Section 101(a)(5) are clear that merely by having one of the officers involved in a proceeding does not disqualify everyone else in the local union from participating in an internal union proceeding. This statute was designed to foster democratic

procedures within the union and if every time a dispute arises within the union a Court takes it away from the union then those democratic procedures are never going to develop and a legion of cases can be cited for that proposition.

• • •

EXHIBIT B — EXCERPTS OF TRANSCRIPT OF FEBRUARY 20, 1981 HEARING

[Commencing at page 536]

MR. WITLEN: Your Honor, I don't know whether you want to skip ahead to paragraph 9 but I should advise the Court that not only does the general president have problems complying with that but also Joint Council 10 has problems.

THE COURT: I think it may be well for us then to go forward to that issue and address it.

Now by reason of the fact that I am proposing to order some conditions beyond those that were included in the stipulation it seems to me I must have some undertaking from any third party who is to conduct this election that it will be conducted in accordance with this order. Otherwise there is too much risk that we have very extensive future controversy about enforcement of the Court's order with possibilities of not one additional election but more if there were problems about it. It seems to me I must have an undertaking from anyone who is going to conduct the election that it be done in conformity with the Court's order. If it were being done by a party we would have it in effect by the appearance before the Court and the parties being bound by the Court's order. If we are having a third party do it, not a party to the litigation, that party [537] must be subject to the order of this Court to do it in accordance with the order of the Court and it seems to me the only way to accomplish that or at least the best way to accomplish it is by a formal undertaking by that party.

Now if Joint Council 10 is not willing to do that then it seems to me I have to hear the parties on what other arrangements to make and order some third party who is willing to make that

undertaking to conduct the election.

Now I recognize that Joint Council 10 is not a party and therefore counsel are not in a position to speak for Joint Council 10 but if you tell me that Joint Council 10 appears not to be willing to make this undertaking then I think I must proceed to hear you promptly on what alternative arrangements the Court should consider for supervision of the election.

MR. WITLEN: Although I do not represent Joint Council 10, I am prepared to tell the Court that Joint Council is not willing to undertake the responsibility or sign any document which might render it possibly liable to a contempt proceeding in this Court or any other type of proceeding in the event the election is run amiss for some [538] reason or another.

THE COURT: Then isn't it clear I must order somebody else to conduct the election who is willing to undertake to do it in accordance with the Court's order?

MR. WITLEN: We understand your position, your Honor, and unfortunately that's the Joint Council's position.

THE COURT: All right. Now how do you wish to address this question? It obviously is going to result in some further delay in holding the election but I think it must be resolved.

MR. STERN: I don't think it will result in any delay, your Honor. We expect to hear Monday from the American Arbitration Association as to their willingness — the local entity has indicated a willingness to deal with this matter. They are just checking it through I think their Washington or New York headquarters for review. Where they indicated the local's willingness that they would have a response by Monday, they were talking about this Court's timetable, not a delayed timetable. So it is very possible as of Monday we will know there is an entity prepared to undertake this.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

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SUPREME COURT, U.S.

LOCAL NO. 82, FURNITURE AND PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN, AND PACKERS, ET AL.
Petitioners

v.

No. 82-432

JEROME CROWLEY, ET AL.
Respondents

MOTION TO LIMIT ISSUES IN WRIT OF CERTIORARI AND/OR TO DISMISS WRIT AS IMPROVIDENTLY GRANTED

The Respondents in the above entitled matter, Jerome Crowley et al., move this Honorable Court to limit its grant of certiorari to only one of the two questions for which the writ was sought and allowed; and, if limited, to dismiss the entire writ as improvidently granted. In support thereof the Respondents say:

I. The Court granted certiorari on a Petition presenting two questions, the second of which was:

> Do the remedies prescribed by §402 of the Act, 29 U.S.C. §482, for resolving disputes concerning the election of union officers proscribe the jurisdiction of the district court to enjoin the tabulation of ballots cast after the balloting process has been virtually completed?

(A) The question of whether this case concerned an "election already conducted" is not, and never was, in actual controversy in the instant case, as is demonstrated by the following brief review of the proceedings below:

(1) On December 12, 1980, shortly after Respondents filed this action, the District Court issued a temporary restraining order impounding the ballots in Petitioners' election pending further consideration of whether the Court should enjoin the ballots' being counted and order a new election conducted (Appendix to Petition for Writ of Certiorari (hereinafter App.) @ 104a-105a);

(2) On January 9, 1981 Petitioners voluntarily and unilaterally declared that electoral process to be null and void, and argued as a consequence that the District Court

lost jurisdiction of the claims before it (App. # 4a, in text and ftnt. 4);

(3) On July 13, 1981 the Court issued an injunction, which among other things incorporated into the form of an order the action the Petitioners had voluntarily taken (App. # 86a-93a).

When the injunction issued, indeed even in April, when the Court showed all parties its proposed order, neither party was requesting tabulation of the ballots cast on or before December 13, 1980. Though the aforestated question was potentially in issue in the case filed by the Respondents in December, 1980, Petitioners' unilateral actions, preceding the District Court's issuance of any injunction, waived and/or mooted any such question long before it was first raised by any party. Hence this issue was neither involved in nor discussed in the proceedings before the District Court, and no evidence or argument regarding this question was ever presented to or developed in the record created there. Indeed this issue was not even one designated on appeal to the Court of Appeals, though Petitioners did mention it in a footnote in their Brief to the First Circuit Court of Appeals, and the Secretary of Labor, who first intervened in these proceedings when they were pending oral argument before the Court of Appeals, thereafter discussed it at some length.

When the District Court issued its injunction, there was no "nearly completed" electoral process in progress to enjoin. The first election, far from having been completed and awaiting only the counting of ballots cast, had been nullified by January 19, 1981 voluntary action action of the union, not the subsequent orders of the Court. To the extent that the District Court refers in its July order to voiding the first election, it merely incorporates in its order that which the union had already agreed to do, and/or, by so declaring, had done. At the time the District Court issued

that order, all the Court had left to address regarding the first election was the issue set forth in the first, not the second question presented on the instant petition: what scope of relief, if any, could the Court order to remedy the effect of the Title I violations that had perpeated the nomination process.

The fact that no controversy regarding this question was or is presented in the instant case is further demonstrated by the fact that there was never, and still is, no order a Court could enter to effect any relief related to the above question. For these reasons the Court should not and cannot consider this question on the instant writ.

(B) Even if the Petitioners' declarations had not removed and or mooted this issue from the instant case long before the Federal Respondent first raised it, there is an additional reason why this Court should not consider this question on the instant writ. Even if the Petitioners had not long ago unilaterally and unequivocably voided the first electoral process, the only relief they could request this Court grant on this question is the reinstatement of an election conducted in clear violation of the explicit, mandatory timing requirements of 29 U.S.C. 1482 and the Secretary of Labor's regulations promulgated thereunder.

If the Court considers this question, and thereupon grants the relief Petitioners request and Secretary urges, it would necessarily void the District Court supervised, 1981 election, and reinstate the results of the ballots cast in 1980. As soon as this occurred, any member of the union would have the automatic right under the Act and 24 C.F.R. 452.136(a)(1) to have the union, the Secretary or the District Court void the results of the electoral process reinstated by this Court. For in the 1980 election, which was conducted by mail ballot, the ballots were required as a matter of law to have been both sent out no sooner than thirty days after the nominations meeting (i.e., 30 days

after November 9, 1980)(29 C.F.R. 452.72) and no later than fifteen days before the last date on which they could be returned (i.e., 15 days before December 13)(29 C.F.R. 452.102). By definition this election, for which nominations were made on November 9th and mail ballots returnable no later than December 13th, could not have complied and did not comply with these two related requirements of both Title IV of the Act and the regulations promulgated thereunder.

By requesting relief under this question, Petitioners and the Secretary of Labor ironically urge this Court to sanction an electoral process that was on its face conducted in violation of both a federal statute and the Secretary's own regulations thereunder. If equity would not estop Petitioners and the Secretary from seeking such relief of this Court, it certainly would make the granting of such relief by this Court at a minimum inappropriate. Hence for this additional reason the Respondents urge this Court not to entertain the second question Petitioners have presented to it.

II. In addition, Respondents request that, if the relief urged above is granted to them, the Court dismiss the instant writ in its entirety as improvidently granted because the remaining question presented, standing alone, does not meet the criteria for granting certiorari. In support of this request Respondents incorporate by reference and rely upon the reasons related to this question stated in their previously submitted Opposition to the Petition.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

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Petitioners,

v.

JEROME CROWLEY, et al.

Respondents.

No. 82-432

PETITIONERS' OPPOSITION TO RESPONDENTS' MOTION TO LIMIT ISSUES AND/OR TO DISMISS WRIT

On March 4, 1983 Local 82, et al., defendants below and petitioners before this Court, received a copy of plaintiffs-respondents' motion urging this Court to limit its review to the first question presented in the petition,[1/] decline to review the second[2/] and then dismiss the writ because the first issue does not merit the consideration of this Court.

1) In support of their motion, plaintiffs first contend that the second question should be dismissed because it was first raised before the Circuit Court. It must be noted that the question at issue challenges the district court's jurisdiction to consider the complaint in its entirety. It is axiomatic that a court's jurisdiction to consider a cause of action can be raised at any time or, if the parties fail to

1/ 1. Does §102 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §412, authorize a district court, on the basis of a suit by individual union members, to order a union to conduct an election of officers under the supervision of third parties not associated with the union, who have been appointed by the court and utilizing election rules and procedures prescribed by the court?

2/ 2. Do the remedies prescribed by §402 of the Act, 29 U.S.C. §482, for resolving disputes concerning the election of union officers proscribe the jurisdiction of the district court to enjoin the tabulation of ballots cast after the balloting process has been virtually completed?

present the question, by any court before which the case is pending. Moreover, the parties may not establish jurisdiction by stipulation. Swift & Co. v. Hocking, 243 U.S. 281, 289 (1917). Thus, the Local Union's attempt to stipulate to a new election in January, 1981, cannot create jurisdiction in the district court at the time the complaint was filed in December, 1980, if no such jurisdiction existed at that time. Plaintiffs made the same argument before the Circuit Court, but it was rejected. (Pet. App. B at 78a).

The second issue provided the basis upon which the First Circuit determined that the district court had subject-matter jurisdiction over the complaint at the time it was filed. Other challenges to the district court's jurisdiction had previously been rejected by that court. (Pet. App. A at 6a-13a) Neither the Local Union nor the Secretary of Labor as intervenor before the Circuit Court were precluded from raising additional jurisdictional arguments involving legal, not factual, issues before the appellate court. When one of those additional arguments became the focal point of the First Circuit's decision it, obviously, became a matter warranting the consideration of this Court, especially since the lower court's decision conflicted with those of other circuit courts of appeals. The fact that the jurisdictional issue in question was not first defined until the appeal does not preclude this Court's consideration of the propriety of the Circuit Court's decision.

2) Plaintiffs' second reason for revoking the writ granted to consider the jurisdictional issue is based upon the alleged legal invalidity of the election which underlies this entire litigation. The Local Union confesses at the outset that it fails to understand plaintiffs' argument and points

out that it has never been raised previously, although plaintiffs had an opportunity to do so in their opposition to the petition for a writ of certiorari.

Moreover, the proposition plaintiffs assert as a settled legal question is patently incorrect. They assert that the Department of Labor's interpretive regulations concerning the Labor-Management Reporting and Disclosure Act of 1959 require a minimum period of forty-five (45) days between a nomination meeting and the tabulation of ballots in a mail ballot election of union officers. Aside from the fact that plaintiffs conveniently ignore the fact that no such period was provided in the election of officers ordered by the district court in this case (see, Pet. App. B at 86a-93a), and that the Department's regulations are not legally binding,[3/] those regulations do not require more than the statutory fifteen (15) day notice of an election[4/] and specifically permit a nomination meeting and election to be held on the same day.[5/] Although members are entitled to inspect membership lists during the thirty (30) day period prior to an election[6/], there is nothing which prevents any member from exercising that right prior to the nomination meeting.[7/] Nor is there any basis for plaintiffs' conclusion that the thirty (30) day period of inspection must be added to the fifteen (15) day period of notice of election to constitute a forty-five (45) day requirement between nominations and election.

3/ Alvey v. General Electric Co., 622 F.2d 1279, 1286 n.7 (7th Cir. 1980), citing Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944).

4/ §401(e), 29 U.S.C. §481(e); 29 C.F.R. §452.102.

5/ 29 C.F.R. §452.65.

6/ §401(c), 29 U.S.C. §481(c); 29 C.F.R. §452.71.

7/ Yablonski v. United Mine Workers, 71 L.R.R.M. 2606 (D.D.C. 1969) (declared candidate entitled to §401(c) protections prior to being formally nominated).

Plaintiffs' citations do not support a finding that the December, 1980 election was improper, as a matter of law, because of its scheduling. However, the ultimate conclusion as to the propriety of that election should not affect this Court's decision to review the lower court's determination that the district court had jurisdiction to consider the complaint.

3) Finally, plaintiffs urge this Court to dismiss the writ as improvidently granted because the first issue, involving a matter of statutory construction, does not warrant the Court's attention. It serves no purpose to repeat the reasons advanced to justify granting the writ set forth in the Local Union's petition. Accordingly, in the interest of brevity, the Court is referred to the arguments contained therein.

For the foregoing reasons, it is respectfully submitted that plaintiffs' motion to limit the issues in the writ of certiorari and/or to dismiss the writ as improvidently granted be denied in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petitioners' Opposition To Respondents' Motion To Limit Issues and/or To Dismiss Writ was served by mailing a copy thereof, first-class, postage prepaid to the following:

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Dated: March 11, 1983

No. 82-432

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In the Supreme Court of the United States

OCTOBER TERM, 1982

LOCAL NO. 82, FURNITURE AND PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN, AND PACKERS, ET AL., PETITIONERS

v.

JEROME CROWLEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether the enforcement system created by Title IV of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 482, for violations of the Act occurring in the course of a union election precludes a court from enjoining the counting of ballots and ordering a new election under the supervision of the court in order to remedy violations of Title I of the Act occurring at a nominations meeting.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 41a-93a) is reported at 679 F. 2d 978. The opinion of the district court (Pet. App. 1a-40a) is reported at 521 F. Supp. 614.

JURISDICTION

The judgment of the court of appeals (Pet. App. 94a) was entered on May 21, 1982. A petition for rehearing was denied on June 15, 1982 (Pet. App. 95a). The petition for a writ of certiorari was filed on September 13, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. 411, 412, 481, 482, and 483, are set out at Pet. App. 96a-103a.

STATEMENT

1. On November 9, 1980, a meeting was held to nominate candidates for the seven-member executive board of petitioner Local No. 82, Furniture and Piano Moving, Furniture Store Drivers, Helpers, Warehousemen, and Packers ("Local No. 82"). The election was a controversial one, and several disputes arose in the course of the nomination meeting. One concerned the requirement that Local members show a computerized dues receipt in order to be admitted to the meeting (Pet. App. 43a). The district court found that such a requirement had not been imposed at earlier meetings (*id.* at 19a). Several members, including respondent Jerome Crowley, were denied admission for lack of a receipt (*ibid.*).

The second controversy occurred when nominations were made. Petitioner Bart Griffiths, the incumbent secretary-treasurer of the Local who was conducting the meeting, was nominated for reelection to that position. The district court found that respondent John Lynch was also nominated for secretary-treasurer, though Griffiths ignored the nomination and announced that he was running unopposed (Pet. App. 21a). Griffiths included Lynch among the candidates for president (*id.* at 44a).

Crowley, Lynch, and others filed a protest concerning the conduct of the nominations meeting with Local No. 82, with Teamsters Joint Council 10, and with the International Union. On November 20, 1980, Local No. 82 denied the

protests.[1] Ballots were thereafter mailed to Local members (Pet. 4) and were to be received by the Local no later than 9:00 a.m. on December 13, 1980.

2. On December 1, 1980, respondents filed this action in the United States District Court for the District of Massachusetts on behalf of themselves and two classes of members (not certified by the district court) against petitioners Local No. 82, Griffiths, the president of the Local, and members of its election committee. Respondents alleged that petitioners had violated several provisions of Title I of the LMRDA and sought preliminary injunctive relief (Pet. App. 2a-3a, 44a-46a). In particular, respondents claimed that restricting admission to those with dues receipts and the failure to recognize Lynch as a candidate for secretary-treasurer violated Section 101(a)(1) ("equal rights * * * to nominate candidates * * * [and] to attend membership meetings") and Section 101(a)(2) ("right to meet and assemble freely with other members; * * * and to express * * * views [] upon candidates") of the Act, 29 U.S.C. 411(a)(1) and (2).[2]

On December 12, 1980, the district court issued a temporary restraining order preventing the Local from counting the ballots, some of which had already been received. On July 13, 1981, the court issued a preliminary injunction declaring the nominations received at the November 9, 1980 meeting to be "legally without effect" and ordering a new

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[1] A hearing before Joint Council 10 was cancelled when this action was filed. No action was taken by the International Union (Pet. App. 15a-16a).

[2] Respondents also made several claims under Titles I and IV concerning increases of local dues and concerning the union rule that only members who have paid their dues on time for the 24 months preceding the nominations meeting may be candidates (Pet. App. 7a-8a). The district court declined for a variety of reasons to grant preliminary relief on these claims (*id.* at 12a, 22a-23a, 25a-37a).

nominations meeting and mail ballot election to be supervised and conducted by Lawrence Katz and the Honest Ballot Association of New England ("the arbitrators") (Pet. App. 86a). The injunction set forth the eligibility requirements for attendance at the nominations meeting, candidacy for office, and voting, and directed that disputes about eligibility would be resolved by the arbitrators (*id.* at 87a-91a). It also provided that the arbitrators were to make arrangements consistent with the union's by-laws and constitution for distribution of campaign literature (*id.* at 91a).

3. Petitioners appealed, and the Secretary of Labor intervened in the appeal. They argued that the district court lacked authority to enjoin the tabulation of ballots and order new court-supervised nominations and an election as a corrective for Title I violations occurring in the course of the election. Petitioners and the Secretary contended that, under those circumstances, the exclusive remedy was the post-election procedure afforded in Title IV of the LMRDA. Section 402 (29 U.S.C. 482) provides that a member complaining of violations in the course of an election must, after exhausting his remedies within the union, file a complaint with the Secretary. If, after investigation, the Secretary finds probable cause to believe that a violation has occurred, he may initiate an action to have the election set aside and a new one conducted "under supervision of the Secretary * * *." Section 403 (29 U.S.C. 483) also provides that "[t]he remedy provided by this subchapter for challenging an election already conducted shall be exclusive." Petitioners and the Secretary argued that to permit court-ordered and supervised elections as a remedy for violations of Title I would frustrate the very purposes underlying Title IV: avoidance of delay in the conduct of elections, a preference for resolution of such problems, where possible, by the union itself, screening of frivolous

complaints and consolidation of apparently meritorious ones by the Secretary, and reliance on the Secretary's expertise in supervising remedial elections.

The court of appeals affirmed (Pet. App. 41a-85a). The court found no indication in the decisions of this Court that Title IV remedies, including ordering a new election, were intended to displace the relief available to a court in actions under Title I (*id.* at 49a-52a). It also found in the legislative history of the LMRDA "no evidence that limitations on Title I by Title IV were ever contemplated" (*id.* at 58a-59a). The court found inapplicable the "exclusive remedy" provision in Section 403 since, it concluded, an election is not "already conducted" within the meaning of that section "until all the ballots are counted" (Pet. App. 67a)—a situation, thanks to the district court's temporary restraining order, not presented in this case.[3]

Judge Campbell dissented. He would have held that "the proper accommodation between Title I and Title IV requires consideration not only of the stage which the election process has reached but the nature of the relief" (Pet. App. 83a). Judge Campbell concluded that, if a new supervised election would be required to remedy election violations perceived by the district court in a case such as this, "many concerns argue against finding Title I jurisdiction: intrusiveness, delay, disruption, and the court's lack of expertise in this area, especially as compared to the Secretary" (*ibid.*).

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[3]The court of appeals also rejected claims by petitioners that the preliminary injunction was improper under traditional equitable principles and that the district court had improperly refused to require respondents to post a bond (Pet. App. 68a-82a).

DISCUSSION

As the court of appeals' opinion indicates, the lower courts have struggled to accommodate the overlapping rights and conflicting remedies provided in Titles I and IV of the LMRDA. The results have been diverse and largely unsuccessful. Resolution of the confusion by this Court is important, because the issue can arise in many of the large number of union elections held each year. Moreover, the decision below is incorrect. By permitting Title I nullification of an election and approving a judicially supervised rerun, the court of appeals' ruling ignores the concern, expressed by this Court, that Title I not be used to undermine the important statutory policies implemented by the Title IV remedial scheme.

1. Title I of the LMRDA, the "Bill of Rights" title, grants union members several rights relevant to the election process. Section 101(a)(1) of the Act (29 U.S.C. 411(a)(1)) gives

> [e]very member of a labor organization * * * equal rights * * * to nominate candidates, to vote in elections * * * to attend membership meetings, and to participate in the deliberations * * * of such meetings * * *.

Section 101(a)(2) (29 U.S.C. 411(a)(2)) gives

> [e]very member * * * the right to meet and assemble freely with other members; * * * and to express * * * his views[] upon candidates in an election of the labor organization * * *.

Title IV of the LMRDA, the "Elections" title, creates a system of election procedures and related rights for union members. Of particular relevance to this case, Section 401(e) (29 U.S.C. 481(e)) provides that

> [i]n any election required by this section * * * a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be

> eligible to be a candidate and to hold office (subject to * * * reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate * * * of his choice * * *.

The parallel rights granted by Title I and Title IV are enforced by different means. Title I states (29 U.S.C. 412) that

> [a]ny person whose rights secured by [this Title] have been infringed * * * may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate.

By contrast, Title IV requires exhaustion of internal remedies, followed by the filing of a complaint with the Secretary, who then decides whether to seek judicial review and, where appropriate, a new election "under supervision of the Secretary." 29 U.S.C. 482. Section 403 (29 U.S.C. 483) also states that

> [n]o labor organization shall be required by law to conduct elections of officers * * * in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by this subchapter. Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this subchapter. The remedy provided by this subchapter for challenging an election already conducted shall be exclusive.

The court of appeals construed the "exclusive remedy" provision in Title IV to apply only after the votes in an election have been tabulated (Pet. App. 65a). That interpretation, as the court below recognized, would leave a vacuum unfilled by Section 403. " 'Prior to the day of an election an individual can sue * * *. The day after an election the

Secretary of Labor assumes jurisdiction.' • • • What is meant to happen the day of an election, essentially the problem here, is unsaid" (*id.* at 63a).

Perhaps more important, the court of appeals' approach, which sanctions judicial intervention to prevent the counting of ballots and to order a new election, will have important effects on the remedial structure for LMRDA election violations. There are more than 53,000 labor organizations subject to the requirements of the Act, most of which are local unions required to hold officer elections at least triennially. Labor-Management Services Administration, U.S. Dep't of Labor, *Compliance, Enforcement and Reporting in 1978*, at 29 (1981). Because many challenges to union election procedures can be styled as violations of either Title I or Title IV, complaints arising in the course of such elections may—if quickly filed—result in judicial nullification of an election and court-supervised rerun procedures. The Title IV exhaustion of internal remedies and control of elections by the Secretary deemed desirable by Congress could be substantially displaced.[4]

2. Although the Secretary believes that the court of appeals' decision is at odds with the language and purpose of the Act and the decisions of this Court, the decision is at least understandable in light of the confusion that prevails among the lower courts. What Title I remedies are available, and at what times, in response to election-related violations are issues that have proven uniquely troublesome. Some courts have interpreted this Court's decision in *Calhoon* v. *Harvey*, 379 U.S. 134 (1964), to mean that even

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[4]Although Section 101(a)(4) of the Act, 29 U.S.C. 411(a)(4), indicates that exhaustion of internal remedies concerning Title I claims may be appropriate, this Court has construed the statute to leave the decision within the discretion of the district court. *NLRB* v. *Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 426-428 (1968).

before an election is begun, claims that fall under both Title I and IV should be enforced according to Title IV procedures.[5] Others have suggested that an upcoming election may be enjoined in order to enforce free speech or discrimination claims that could also find shelter in Title IV.[6] Some courts have held that claims for injunctive relief under Title I may not be entertained once election ballots have been distributed,[7] or at all events, once they have been returned.[8] The court of appeals in this case found no such constraint. Some courts have even permitted injunctive relief for Title I election claims after the ballots have been counted and the results announced.[9] Others have disagreed.[10] Commentary on the confusion has been prolific.[11]

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[5] *Driscoll* v. *International Union of Operating Engineers*, 484 F. 2d 682, 688 (7th Cir. 1973), cert. denied, 415 U.S. 960 (1974).

[6] *Depew* v. *Edmiston*, 386 F. 2d 710, 712 (3d Cir. 1967); *Canez* v. *Guerrero*, Civ. No. 82-811 PHX-EHC (D. Ariz., June 5, 1982), reproduced at Pet. App. 106a-111a. Cf. *Schonfeld* v. *Penza*, 477 F. 2d 899, 903-904 (2d Cir. 1973).

[7] *Laski* v. *International Organization of Masters, Mates and Pilots*, 502 F. Supp. 134, 135-136 (S.D.N.Y. 1980).

[8] *McDonough* v. *Local 825, International Union of Operating Engineers*, 470 F. 2d 261, 264 (3d Cir. 1982); *New Action Coalition* v. *Local 2, United Federation of Teachers*, 510 F. Supp. 1208, 1211 (S.D.N.Y. 1981).

[9] *Kupau* v. *Yamamoto*, 622 F. 2d 449, 454-457 (9th Cir. 1980); *Kraska* v. *United Mine Workers*, 686 F. 2d 202, 207 (3d Cir. 1982).

[10] *McDonough* v. *Local 825, supra; Venet* v. *Local 606, United Brotherhood of Carpenters*, 342 F. Supp. 819 (D. Minn. 1972). Cf. *McGuire* v. *Grand International Division of the Brotherhood of Locomotive Engineers*, 426 F. 2d 504 (6th Cir. 1970).

[11] See, e.g., *James, Union Democracy and the LMRDA: Autocracy and Insurgency in National Union Elections*, 13 Harv. C.R.-C.L.L. Rev. 247 (1978); Comment, *Titles I & IV of the LMRDA: A Resolution of the Conflict of Remedies*, 42 U. Chi. L. Rev. 166 (1974); Note, *Pre-election Remedies Under the Landrum-Griffin Act: The "Twilight Zone" Between Election Rights Under Title IV and the Guarantees of*

In none of the cases referred to, however, has a court taken the extraordinary step of ordering a rerun election with new nominations, to be conducted according to procedures and supervised by arbitrators chosen by the court. Even in those cases that have entertained Title I claims where there was no question that an election had been completed, the relief granted has been the instatement in office of the winning candidates, not the conduct of a new election. *Kupau* v. *Yamamoto, supra*, 622 F. 2d at 453; *Kraska* v. *United Mine Workers, supra*, 686 F. 2d at 207. The remedy approved by the court of appeals in this case ignores the explicit and exclusive procedure set out in Title IV, 29 U.S.C. 482(c), for conducting new elections. It also overlooks the obvious emphasis that Section 403 (29 U.S.C. 483) places on "challenging an election" through Title IV procedures and not otherwise. See also *Dunlop* v. *Bachowski*, 421 U.S. 560, 566 (1975) ("Provisions concerning the conduct of the election itself * * * may be enforced only according to the post-election procedures specified in 29 U.S.C. § 482").

3. In a series of decisions beginning with *Calhoon* v. *Harvey, supra*, this Court has expressed its concern that Title I not be used as a means to bypass the remedies afforded in Title IV, and has stressed the importance of the statutory policies underlying Title IV's remedial scheme. In *Calhoon* the Court rejected an attempt by union members to enjoin an upcoming election on the ground that union bylaw and constitutional provisions denied them their right to nominate candidates protected by Section 101(a)(1). The

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Titles I and V, 74 Colum. L. Rev. 1105 (1974); Note, *Union Elections and the LMRDA: Thirteen Years of Use and Abuse*, 81 Yale L.J. 407 (1972); Berchem, *Labor Democracy in America: The Impact of Titles I & IV of the Landrum-Griffin Act*, 13 Vill. L. Rev. 1 (1967).

Court concluded that eligibility claims like the plaintiffs' were properly enforced under Title IV, not Title I. 379 U.S. at 138-139. Regarding Title IV's post-election remedy, the Court went on to say (*id.* at 140):

> It is apparent that Congress decided to utilize the special knowledge and discretion of the Secretary of Labor in order best to serve the public interest. * * * In so doing Congress * * * decided not to permit individuals to block or delay union elections by filing federal-court suits for violations of Title IV. Reliance on the discretion of the Secretary is in harmony with the general congressional policy to allow unions great latitude in resolving their own internal controversies, and, where that fails, to utilize the agencies of Government most familiar with union problems to aid in bringing about a settlement through discussion before resort to the courts.

Subsequent cases have added further justifications for adhering, where possible, to the structure created by Title IV:

> Congress made suit by the Secretary the exclusive post-election remedy for two principal reasons: (1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections, and (2) to centralize in a single proceeding such litigation as might be warranted * * *.

Trbovich v. *United Mine Workers*, 404 U.S. 528, 532 (1972). See also *Dunlop* v. *Bachowski*, *supra*, 421 U.S. at 568-570; *Wirtz* v. *Glass Bottle Blowers Association*, 389 U.S. 463, 470-471 (1968).

Those important considerations are frustrated to the maximum degree where a court, as here, nullifies an election by preventing the counting of ballots and orders a new

election according to procedures and supervised by arbitrators dictated by the court. The Secretary's expertise in the conduct of elections is then entirely cast aside. The delay that can result is typified by the sequence in this case: the election nullified on December 12, 1980 was not rerun until exactly one year later (Pet. 18 n.39). A hearing to review the conduct of the nominations meeting, undertaken by Teamsters Joint Council 10, was cancelled when this action was filed (Pet. App. 15a-16a). Review of respondents' claims and the possibility of extra-judicial resolution by the Secretary was short-circuited. Moreover, it was only a fortuity—and one that will not necessarily recur in similar cases—that the claims concerning the conduct of the election were all consolidated in this action.

These consequences need not have occurred. The claims that the district court found warranted preliminary injunctive relief under Title I fell equally within the scope of the rights granted in Title IV. See, e.g., *Wirtz* v. *National Maritime Union*, 399 F. 2d 544, 548-549 (2d Cir. 1968). Had the district court not intervened, the ballots could have been counted less than 24 hours after the court issued a temporary restraining order, and the enforcement scheme set out in Section 402 (29 U.S.C. 482) could have been immediately implemented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 82-432

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LOCAL NO. 82, FURNITURE AND PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN, AND PACKERS; BART GRIFFITHS, SECRETARY-TREASURER, LOCAL NO. 82; GEORGE HARRIS, PRESIDENT, LOCAL 82; PHILLIP PIEMONTESE, CHAIRMAN OF THE ELECTION COMMITTEE OF LOCAL NO. 82; and JOHN DOE, JAMES DOE and JEROME DOE, MEMBERS OF THE ELECTION COMMITTEE OF LOCAL NO. 82,

Petitioners,

RAYMOND DONOVAN, SECRETARY OF LABOR,

Intervenor,

v.

JEROME CROWLEY, ANTHONY COYNE, JOSEPH FAHEY, ROBERT LUNNIN, JAMES HAYES, GERALD OWENS, JOHN LYNCH, JOSEPH TRASK, JOSEPH MONTAGNA, and DENNIS BATES,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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QUESTIONS PRESENTED

1. Does § 102 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 412, authorize a district court, on the basis of a suit by individual union members, to order a union to conduct an election of officers utilizing election rules and procedures not contained in the union's bylaws but, rather, prescribed by the court and under the supervision of third parties who are not associated with the union and who were appointed by the court?

2. Do the remedies prescribed by §§ 402 and 403 of the Act, 29 U.S.C. §§ 482 and 483, for resolving disputes concerning the election of union officers proscribe the jurisdiction of the district court to enjoin the tabulation of ballots cast after the balloting process has been virtually completed?

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JEROME CROWLEY, ANTHONY COYNE, JOSEPH FAHEY, ROBERT LUNNIN, JAMES HAYES, GERALD OWENS, JOHN LYNCH, JOSEPH TRASK, JOSEPH MONTAGNA, and DENNIS BATES,

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the District Court for the District of Massachusetts is reported at 521 F. Supp. 614, and is

reprinted in Appendix A of the Petition for a Writ of Certiorari (Pet. App. A at 1a-40a) filed on September 13, 1982. The opinion of the United States Court of Appeals for the First Circuit is reported at 679 F.2d 978, and is reprinted in Appendix B of the Petition, at pages 41a-93a.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on May 21, 1982 (Pet. App. C at 94a). On June 15, 1982, the Court of Appeals entered an order denying Defendants-Appellants' petition for rehearing and suggestion for rehearing en banc (Pet. App. D at 95a). The Petition for a Writ of Certiorari was filed on September 13, 1982, and was granted on January 24, 1983. This Court has jurisdiction to review the judgment of the court below pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Titles I and IV of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. §§ 411-412, 481-483, the pertinent parts of which are reprinted in Petition Appendix E, at pages 96a-103a.

STATEMENT OF THE CASE

Introduction

The district court, acting upon the suit of members of Local Union 82 under § 102 of the LMRDA, entered an injunction prohibiting the local union from opening mail ballots cast in its triennial election of officers on the day before those ballots were to have been retrieved from their post office box repository. The district court directed the Local to conduct a new nomination meeting and election utilizing terms specified by the court, which differed from those contained in the Union's bylaws, and under the supervision of third parties not associated with the Union but, rather, appointed by the court.

The court of appeals affirmed the appropriateness of the remedies imposed, finding that the procedures set forth in § 402 of the Act were not activated until all of the ballots cast in an election were tabulated. Both courts rejected the Union's arguments that the district court: (a) exceeded the scope of its statutory authorization under § 102 because the remedy entirely subverted the statutory scheme which vests the exclusive authority to conduct rerun elections of union officers in the Secretary of Labor and, (b) lacked jurisdiction to consider the complaint under Title I. These are the issues that this Court has granted certiorari to review.

STATEMENT OF FACTS

Local Union 82 is a labor organization, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and is required to conduct its election of officers no less frequently than once every three years. § 401(b), 29 U.S.C. § 481(b) (Pet. App. E at 98a). Plaintiffs are members of that Union, which consists of approximately seven hundred employees of companies engaged in the furniture moving business in the Boston area. The Union is governed by a seven-member elected executive board. At the time suit was brought, Bart Griffiths was the elected secretary-treasurer and principal executive officer, and George Harris was the elected president.[1] The Local Union had conducted previous elections by mail referendum balloting (R. 288-89) and the executive board exercised its discretion under the Union's bylaws and constitution to utilize that method of voting in the 1980 election (Pet. App.

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[1] The Local Union has a history of contested elections of officers, Griffiths having been elected to the office of Secretary-Treasurer for the first time in the 1977 election (R. 394) and Harris having served two prior terms as the Local's President (JA 91; R. 377). Both Harris and Griffiths had opposition in the 1977 election, the former defeating plaintiff Anthony Coyne (R. 394-95; JA 92).

A. at 17a).[2] The ballots were scheduled to be tabulated on December 13, 1980, and had to have been returned to a designated post office box by 9:00 a.m. on that date in order to be counted (Exh. 12, Pet. App. H at 113a).

As the court of appeals noted, this case concerns only one event, the meeting held on November 9, 1980, for the nomination of candidates for the seven elected positions in the Local (Pet. App. B at 43a). It is undisputed that the meeting was attended by more members than any conducted by the Local in the prior two years,[3] in part due to the membership's interest in the election[4] but also because the incumbent officers had moved the meeting location to a site more convenient for the members.[5]

At the start of the November 9, 1980 meeting, a dispute arose over the requirement that members verify their good standing status within the Union, a requisite for attending and participating in the nomination meeting.[6] The Local required members to produce a computerized receipt (TITAN receipt) showing that dues had been paid through the month of October, 1980 (Pet. App. B at 43a).[7] Several members, including plaintiff

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[2] Article XXII, Section 4(b) of the 1976 Teamsters Constitution provided, in part, that: "The Local Union Executive Board shall have the authority to establish all rules and regulations for the conduct of the election . . . including the authority to use mail referendum balloting or absentee balloting without membership approval" (Exh. 2 at 137, R. 611).

[3] (R. 400-01; 174).

[4] Pet. App. B at 43a.

[5] (R. 401-02).

[6] Article XXII, Section 4(a) of the Constitution provided, in part, that: "To be eligible to nominate and otherwise participate in the nominations meeting, a member must have his dues paid through the month prior to the month in which the nominations meeting is held" (Exh. 2 at 135, R. 609).

[7] The meeting notice had included the statement that "members must have their receipts on their person and be paid for the month

Jerome Crowley, were refused entry when they failed to produce the necessary record. A delegation of rank and file members met with Griffiths about waiving the requirement, but Griffiths refused. However, he offered to delay the meeting so that Crowley and the other members without the TITAN receipts could return to their homes to obtain them, but this offer was rejected by plaintiff Robert Lunnin (Pet. App. B at 43a; R. 411-12).

Thereafter, Griffiths opened the meeting and announced that the Local Union's requirement that a member attend 50% of the membership meetings conducted in the prior two years in order to be eligible to run for office would not be enforced (Pet. App. A at 19a-20a). As a result, the only requirement to become a candidate for office was that a member's dues had to have been paid in a timely manner during each of the twenty-four consecutive months prior to the month in which the nomination meeting was conducted ("24 month rule"). (Pet. App. B at 44; Rule printed in Pet. App. A at 2a, n.3).

By all accounts, the meeting was disorderly (Pet. App. A at 20a). When nominations for the office of secretary-treasurer were opened, Griffiths was nominated and the nomination was seconded (*Id.*). According to the Local Union, nominations were then closed for that office. John Perry, plaintiff Lynch, and Harris, the incumbent, were then nominated to run for the office of president. Lynch testified that he was nominated to run for the office of president (R. 563), but other plaintiffs contended that Lynch was nominated for the office of secretary-treasurer,

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of Oct." (Pet. App. A at 18a). The TITAN receipt was the only document utilized by the Union which indicated whether the member was current or delinquent in the payment of dues. *Compare* Exh. 19 *with* Exh. 20 (R. 592 and 593). Exh. 19 is a "temporary receipt" and does not indicate the month to which the amount of dues paid by the member has been applied. Exhibit 20 is a "TITAN receipt" and shows a payment on December 18, 1980 which paid the member's dues through the month of November, 1980.

and the district court so held.[8] Nominations for the remaining five offices were less controversial (Pet. App. B at 44a). The most important event during the nomination meeting for purposes of this litigation was the recording of Lynch's nomination.

Balloting packets were subsequently distributed to the local union's membership during November, 1980, and included instructions that ballots be deposited in the mail by December 12, 1980, in time to be recovered from the designated post office at 9:00 a.m. on December 13, 1980 (Exh. 42, Pet. App. H at 115a-16a; R. 425). The ballots were to be tabulated immediately thereafter.

PROCEEDINGS BELOW

A. The District Court

Plaintiffs filed suit on December 1, 1980 (JA 1, Dkt. No. 1), after the balloting packets had been mailed to Local 82's members,[9] invoking the district court's jurisdiction under § 102 of the LMRDA, 29 U.S.C. § 412 (Pet. App. E at 98a). A total of ten "claims" were made, nine of which involved events which occurred prior to or during the nomination meeting.[10] Five "claims" charged de-

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[8] The court of appeals noted the disparity between Lynch's testimony and the finding of the district court, but refused to set aside the district court's conclusion as being clearly erroneous (Pet. App. B at 69a-70a).

[9] The precise date on which the ballot materials were mailed to the membership is not in the record, but the Motion for Preliminary Injunction refers to the ballots having been previously distributed (JA 37, ¶ 4).

[10] The final "claim," a § 101(a)(5) allegation, involved internal union charges brought against Lunnin by Griffiths several days after the nomination meeting as a result of an incident during the nomination meeting (JA 30-31, ¶ 37-39). The Local Union hearing panel rendered a decision which was reversed by Joint Council 10, pursuant to the appellate procedure set forth in the Union's constitution (Pet. App. A at 6a, n.6). No discipline was ever effectuated (JA 98). This resolved that aspect of the Complaint to the satisfaction of all parties (R. 500).

nial of equal rights in violation of 29 U.S.C. § 411(a)(1)[11] (JA 31-32, ¶ 43, 44, 46-48); three alleged denial of the right of free speech in violation of 29 U.S.C. § 411(a)(2)[12] (JA 32-33, ¶ 45, 50, 51); and one charged a violation of the right to nominate candidates as protected by 29 U.S.C. § 481(e)[13] (JA 32-33, ¶ 49). The plaintiffs sought injunctive relief in the form of an order nullifying the November 9, 1980 nomination meeting (JA 37, ¶ 3), directing the Union to reopen nominations (JA 37, ¶ 5), and modifying the Union's candidate-eligibility rules (JA 37-38, ¶ 7). Plaintiffs also sought an award of damages and attorney fees (JA 33, ¶ 5, 6).

From the outset, plaintiffs maintained that they could only receive full relief if the district court addressed the propriety of the Union's "24 month rule" for determining candidate-eligibility (JA 80), even while they conceded that such a determination raised Title IV, not Title I, questions (*Id.* at 80). Plaintiffs asserted that a district court could resolve Title IV issues in a pre-election context under § 102 so long as Title I allegations were raised in the Complaint. (R. 524-25).

The district court issued a temporary restraining order at 4:20 in the afternoon of December 12, 1980, the day before the ballots were to be tabulated and the last day on which they could be marked and mailed (Pet. App. F at 104; JA 2, Dec. 12). The district court specifically stated that it was issuing the injunction to prevent the election from being "consummated" in order to "protect the jurisdiction of this Court" (JA 84, 47). The Local Union was enjoined from tabulating the ballots and was directed to deliver into the district court's possession all ballots which were in the post office box at 9:00 a.m. on December 13, 1980.

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[11] Pet. App. E at 96a.

[12] *Id.*

[13] *Id.* at 99a-100a.

Thereafter, a five day evidentiary hearing on the motion for preliminary relief was conducted during December, 1980. On January 9, 1981, in an attempt to resolve all outstanding Title I allegations (JA 100), counsel for defendants advised the court that the Local Union was willing to conduct a new nomination meeting and election during March and April, 1981 (JA 97, 53, 100). Plaintiffs rejected the offer for a number of reasons, among which was their fear that a new election held under defendants' proposal would be "attackable by any member of the union in a post-election proceeding before the secretary, by the Secretary of Labor" (JA 101). According to plaintiffs, an election held pursuant to an order of the district court would be conducted under that court's supervision, with complaints concerning the election to be resolved by the court, rather than the Secretary of Labor (*Id.*).[14]

The district court found defendants' offer insufficient, and attempted to mediate the differences between the parties, reserving ruling on the outstanding issue of the propriety of the twenty-four month candidate-eligibility rule (R. 484-85, 494-95). Meanwhile, plaintiffs renewed their argument that the candidate-eligibility rule should be considered under Title I (JA 100) and requested extensive discovery which, they acknowledged, would further delay any election (JA 103).

Additional hearings on the procedures of the proposed rerun election were conducted on January 15 and 23; Feb-

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[14] In their brief to the court of appeals, plaintiffs reaffirmed their opposition to the Local Union's offer on the ground that "an election rerun solely on account of the unilateral decision on the part of the local union . . . would therefore be subject to being vacated by either a challenge to the International Union or the Secretary of Labor by one of the original candidates. Yet, if the new election were conducted pursuant to Court Order, no such challenge could be made." Plaintiffs' Appellate Brief in Response, at 32.

ruary 20 and 27; March 6; and April 23, 1981.[15] The district court was unable to resolve the outstanding differences between the parties, the fundamental dispute being over the defendants' insistence that the court lacked jurisdiction under Title I to order a labor organization to conduct an election of officers utilizing procedures other than those specified in the union's governing rules (R. 66-70; JA 111).[16] The court repeatedly assured defendants that they would not waive their underlying objections to the court's jurisdiction by participating in the process by which the court drafted its ultimate order (JA 110, 111-112). At the close of the court's efforts to mediate an election settlement, defendants once again advised the court that they intended to appeal any order directing a new election based on their contention that the court lacked jurisdiction to consider the entire Complaint (R. 575-76, 585-86, 588).

The district court issued a preliminary injunction and memorandum opinion on July 13, 1981 (Pet. App. A at 1a-40a). The court found that it had Title I jurisdiction on the basis of the allegations that the defendants had violated §§ 101(a)(1) and (2) by imposing the TITAN dues receipt requirement as a condition of admission to the nomination meeting and by refusing to allow Lynch to run for the office of secretary-treasurer (*Id.* at 13a). The district court concluded that it lacked Title I juris-

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[15] In addition to the hearings, the district court issued proposed orders on February 12, 1981 (JA 63-68) and April 21, 1981 (JA 69-75) and solicited the positions of the parties with respect thereto. Moreover, after the Local offered to conduct a second election, the district court permitted plaintiffs to amend the complaint to raise an issue subsidiary to the twenty-four month candidate-eligibility rule (JA 61-62). An evidentiary hearing on that matter was conducted on March 6, 1981.

[16] Both the district court and plaintiffs recognized the significant jurisdictional question as to whether the court could order a new election on terms other than those proposed by the Local Union (JA 101-02).

diction to review the union's candidate-eligibility rules and also found that plaintiffs had not established a reasonable likelihood of success on their claim that those rules had been imposed in retaliation for their exercise of § 101(a)(2) free speech rights or had been discriminatorily applied (*Id.* at 12a, 22a-23a).

To remedy the two nomination-meeting-related violations over which it concluded it had jurisdiction, the district court entered an injunction nullifying the November 9, 1980 nomination meeting, restraining the Union from counting the ballots cast in the December 13, 1980 election, and ordering a new nomination meeting and election under terms and conditions established by the court (Pet. App. B at 86a-93a). The court appointed third parties who were neither officers nor members of the union to supervise the new nomination and election [17] and authorized them to render decisions concerning the eligibility of candidates and voters, bypassing the union's constitutional procedures (Exh. 2, Article XXII, Section 5(a) at 139; R. 613). The third parties were also vested with responsibility for other aspects of the election, although no issue had been raised as to the propriety of the Union's actions with regard to these aspects of the first election (*e.g.*, Pet. App. B, ¶ 5(j) at 91a). The Union was directed to bear the entire cost of employing these third parties as well as the expenses incurred in conducting the election. Defendants' request for a stay of those aspects of the injunctive order directing that a new election be held immediately was denied by the district court, as was defendants' request that plaintiffs be

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[17] The district court's decision indicates that the defendants did not object to the third parties appointed to supervise the rerun election (Pet. App. A at 38a). While it is accurate to say that defendants did not specifically object to the particular third parties selected, defendants repeatedly objected to the court's authority to appoint *any* third party to conduct the election (JA 110, 111), an objection acknowledged by the court during trial (JA 111-12).

required to post a bond to secure the costs of the new election (Pet. App. A at 38a-40a).

Thereafter, the district court retained jurisdiction over all aspects of the case not directly involved in the appeal filed with the circuit court. An additional hearing was conducted on August 26, 1981 to modify the election schedule (JA 8, Aug. 26). The court was required to issue an additional order concerning election procedures on October 23, 1981 (JA 11, Dkt. No. 122), as a result of five letters to the court requesting clarifications of the election rules.[15] Another order regarding the eligibility of a nominee to run for office was required when the third parties were unable to resolve that question (JA 12, Dkt. No. 125). The results of the election ordered by the court were not determined until December 12, 1981, exactly one year after the originally scheduled election. During that period, the executive board which had been elected in 1977 continued in office.

Presently pending before the district court is plaintiffs' counsels' renewed application for attorney fees, originally filed on August 26, 1981 (JA 9, Dkt. Nos. 94-99), which has already been the subject of two hearings (JA 12, Nov. 20; Brief App. at 1a) and two orders of the court (JA 9, 13, Dkt. Nos. 106, 127). Also pending is plaintiffs' motion filed on February 2, 1983 alleging that Griffiths had violated the terms of the July 13, 1981 injunction (Brief App. at 1a). The district court conducted a conference on that motion on March 31, 1983, and further proceedings have been directed.

B. The Court of Appeals

An appeal was taken from the district court's decision, pursuant to 28 U.S.C. § 1292. Defendants' motion for a stay of the order to conduct an election pending appeal was denied by the Court of Appeals for the First Circuit

[15] (JA 10-11, Dkt. Nos. 108-09, 113-14, 120).

(JA 17). On December 28, 1981, the Secretary of Labor's motion for leave to intervene as an appellant was granted (JA 18). The First Circuit panel which heard the appeal issued a majority opinion and judgment affirming the district court's decision (Pet. App. B at 41a-93a).

Addressing the jurisdictional question, the majority of the panel held that the district court properly exercised its authority under Title I to remedy the two statutory violations which occurred at the nomination meeting. The court then focused on the word "conducted" in § 403, 29 U.S.C. § 483, and concluded that a suit involving election-related issues was not subject to the exclusive jurisdiction of the Secretary of Labor "until all the ballots are counted" (Pet. App. B at 67a). While the court of appeals acknowledged that the legislative history was silent as to the precise point at which an election has been "conducted," and noted that this Court has consistently recognized the role of the Secretary of Labor in resolving election-related disputes, it read this Court's decisions in *Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972) and *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), as undercutting the policy of judicial noninterference in union elections articulated in *Calhoon* v. *Harvey*, 379 U.S. 134 (1964). (Pet. App. B at 52a) The panel held that requiring members to rely on the Secretary of Labor for resolution of election problems will result in the non-enforcement of important statutory guarantees.[19]

Writing in dissent, Circuit Judge Campbell was "unable to read Title I as extending so far as to allow a district court, once balloting has commenced, to invalidate an election and order a new one under its super-

[19] "[F]oreclosure of Title I claims once balloting begins would prevent effective relief for violations that occur during the election, such as denial of access to the polling place or failure to provide a minority with ballots" (citation omitted) (Pet. App. B at 66a).

vision and under terms and conditions extemporized by the courts and parties" (Pet. App. B at 82a). He recognized that the majority's decision "would allow relief under Title I (ordering and supervising a new election) which heretofore has existed only under Title IV" (*Id.* at 83a). Rejecting the majority's finding that Titles I and IV could be accommodated merely by determining the point in the election process at which a complaint had been filed, Circuit Judge Campbell would have made that determination turn on the nature of the relief requested as well as the stage which the election process has reached (*Id.* at 83a-85a).

SUMMARY OF ARGUMENT

1. The decisions below are contrary to the intent of Congress and the prior ruling of this Court which have defined the scope of the rights protected by the various sections of the LMRDA. That Act was drafted by a Congress which was determined to eliminate "abuses . . . confined to a few unions" while being "careful neither to undermine self-government within the labor movement nor to weaken unions in their role as the bargaining representatives of employees."[20] Nevertheless, the courts below undermined Congress' determination to preserve a strong and independent labor movement by superseding the Union's rules and ignoring its internal dispute-resolution procedures. Moreover, the courts' decisions prevented the Union's members from electing their constitutional officers within the statutory period.

Congress did not intend any of these consequences to result from the passage of the LMRDA. Rather, a review of the legislative history reveals that Congress ulti-

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[20] S. Rep. No. 187, 86th Cong., 1st Sess. at 5 (1959); *reprinted in* National Labor Relations Board, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, (1959) [hereinafter "Leg. Hist."], at 401.

mately chose to prescribe minimal standards for union self-government in order to rectify the abuses first disclosed by the Select Committee on Improper Activities in the Labor or Management Field (McClellan Committee). S. Rep. No. 1684, 85th Cong., 2d Sess., at 4-5 (1958). And this Court has recognized that the Congressional statement of rules regulating the election of union officers was set forth in Title IV, not Title I, of the statute. *Wirtz* v. *Hotel Employees Union*, 391 U.S. 492, 498 (1968). Moreover, Congress chose the Secretary of Labor, not the federal courts, as the agent to determine whether there had been compliance with those election standards. *Calhoon v. Harvey*, 379 U.S. 134, 140 (1964).

Section 403 of the Act provides that the exclusive remedy for a violation of Title IV which may have affected the outcome of an election is a rerun election conducted under the supervision of the Secretary of Labor. *Wirtz* v. *Glass Bottle Blowers*, 389 U.S. 463, 475 (1968). Pre-election remedies were deliberately limited to proceedings in state courts to enforce provisions of a union's bylaws and constitution, unless otherwise specifically stated. Rather than permit individual union members to enforce election rights, Congress established remedial procedures in § 402 which satisfied its goals of affording members honest elections of officers without unnecessary governmental interference. *Id.* at 470-71; *Hodgson* v. *Local 6799, USWA*, 403 U.S. 333, 339 (1971). This Court has recognized § 402 as being deliberately designed to afford unions the opportunity to correct any election violation themselves,[21] to prevent a small faction from delaying an election,[22] and to minimize the disruptive effects of election-related litigation on a union's administration.[23] Not one word of the legislative history

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[21] *Glass Bottle Blowers*, 389 U.S. at 472.

[22] *Calhoon*, 379 U.S. at 140.

[23] *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 532 (1972).

suggests that Congress intended the exclusive Title IV remedy of conducting a new election to be utilized by a court acting under Title I. Nor does the legislative record support the theory that Congress intended to have a district court supplant, under any circumstances, the Secretary of Labor as the governmental agent responsible for supervising rerun elections.

The First Circuit's conclusion that Congress added Title I to supplement the electoral procedures of Title IV because of a lack of faith in the Secretary's enforcement abilities or to authorize judicial activism in the area of union elections[24] is unsupported by the legislative history and inconsistent with the decisions of this Court which have interpreted the statutory scheme.

2. If, as the lower court held, a district court has jurisdiction to order and supervise a rerun election of officers under § 102 before an election has been "conducted," then the Court must determine the point at which a mail ballot election has been "conducted" for purposes of ousting that jurisdiction and for invoking the exclusive jurisdiction of the Secretary of Labor under § 403. It is submitted that in this case the election was "already conducted" at the time suit was filed because the balloting process had commenced and the relief requested by plaintiffs necessitated the conduct of a new election. Since that remedy is a Title IV remedy, and since Congress intended that remedy to be utilized only by the Secretary of Labor, it follows that an election is "conducted" whenever the relief requested would require the nullification of ballots already cast and require a rerun procedure.

The First Circuit's determination that an election is not "conducted" until the ballot tabulation process is completed[25] is inconsistent with the aforementioned Con-

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[24] Pet. App. B at 59a, 67a.

[25] Pet. App. B at 65a, 67a.

gressional interests and is inconsistent with the holdings of other courts. *McDonough* v. *Local 825, Operating Engineers*, 470 F.2d 261, 264 (3d Cir. 1972); *Libutti* v. *DiBrizzi*, 337 F.2d 216, 218 (2d Cir. 1964); *New Action Coalition* v. *Local 2, United Fed. of Teachers*, 510 F. Supp. 1208, 1211 (S.D.N.Y. 1981); *Laski* v. *Inter. Org. of Masters, Mates & Pilots*, 502 F. Supp. 134, 136 (S.D.N.Y. 1980); *Jennings* v. *Carey*, 57 L.R.R.M. 2635, 2641 (D.D.C. 1964).

Adoption of the First Circuit's inflexible rule will promote "races to the courthouse" and will result in the circumvention of the Title IV enforcement procedure whenever an offense actionable under that section of the statute also could be characterized as involving Title I.

ARGUMENT

I. SECTION 102 OF THE LMRDA DOES NOT AUTHORIZE A DISTRICT COURT TO ORDER A RERUN ELECTION OF UNION OFFICERS, TO APPOINT THIRD PARTIES TO CONDUCT AN ELECTION, OR TO PRESCRIBE ELECTION RULES

The LMRDA was the product of a legislative effort to make unions more responsive to their membership and to ensure that members could influence "policy and leadership by free and periodic elections." [26] In approaching its task, Congress considered two alternatives, the first required detailed government regulations covering numerous aspects of a union's internal administration and was supported primarily by the American Civil Liberties Union.[27] The second approach recognized unions as es-

[26] S. Rep. No. 187, *supra* n.20, at 7; I Leg. Hist. at 403.

[27] The ACLU had proposed broad legislation to govern the internal affairs of unions as early as 1947 and reintroduced its proposals in 1958. Those proposals vested enforcement authority in the National Labor Relations Board, eliminated the historic "exhaustion of internal union remedies doctrine", and prohibited unions from subjecting "any member to any unreasonable rules or handi-

sentially private organizations and suggested minimal government intervention in their internal affairs.[28] The Senate Labor and Public Welfare Committee which drafted the 1959 legislation rejected the ACLU approach and "recognized the desireability of minimum interference by Government in the internal affairs of any private organization . . . [and] strongly opposes any attempt to prescribe detailed procedures and standards for the conduct of union business." [29]

While that Committee's Report was drafted before the "bill of rights" provision which subsequently became Title I was added to the Act, the record confirms that the Committee's intent to minimize governmental interference survived the legislative process. A review of the evolution of Titles I and IV supports the conclusion that Congress did not intend to authorize broad pre-election intervention in a union's electoral processes.

A. The Legislative History of Title IV

The present Title IV had its genesis in the 1958 Kennedy-Ives bill, S.3974, a proposal drafted in conformance with the "general philosophy of legislative restraint." [30] The election provisions of that bill were to be enforced by the Secretary of Labor, upon complaint of any union member. State laws regulating union elections were to be inapplicable and litigation by private individuals was precluded.[31] The Kennedy-Ives bill was

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caps." Aaron and Komaroff, *Statutory Regulation of Internal Union Affairs*, 44 Ill. L. Rev. 631, 636-37, 644, 656, 667 (1949); Rothman, *Legislative History of the "Bill of Rights" for Union Members*, 45 Minn. L. Rev. 199, 201-03 (1960).

[28] Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 851, 856-57 (1960) [hereinafter, *"Aaron"*].

[29] S. Rep. No. 187, *supra* n.20, at 7; I Leg. Hist. at 403.

[30] S. Rep. No. 1684, 85th Cong., 2d Sess., at 5 (1958).

[31] *Id.* at 13.

criticized by some members of the Senate Labor Committee as an unwarranted intrusion into the internal affairs of a private association [32] as well as by others who felt that it was inadequate in that it failed to implement the McClellan Committee's recommendation that "vital union decisions" other than elections of officers be made by secret ballot vote of the membership.[33]

In spite of these concerns, the Committee unanimously supported authorizing the Secretary of Labor to administer the procedures for conducting rerun elections. And on the floor, the Senate rejected an amendment which would have undercut such authority by permitting private suits to enforce election rights where the Secretary did not choose to challenge an election.[34] The Senate reaffirmed its faith in the Secretary's ability to establish the procedures for conducting elections by defeating an amendment proposed by Senator Mundt which would have specified such details in the general electoral requirements of the bill.[35] On June 14, 1958, the Kennedy-Ives bill was approved by the Senate by a vote of 88-1,[36] but was defeated in the House.

When the Kennedy-Ervin bill, S.505, was introduced in 1959, it contained union election provisions which were somewhat more detailed than those contained in the

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[32] *Id.* at 45 (Sen. McNamara).

[33] *Id.* at 49, 53 (Supplementary and Minority Views).

[34] 104 Cong. Rec. 1105 (1958), reprinted in Department of Labor, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, Titles I-VI (1964)*, at 711 [hereinafter, "DL Leg. Hist."].

[35] *Id.* at 760. In so doing, the Senate accepted Senator Morse's recommendation that "what we ought to do is to leave [the bill's provisions governing election details] to the Secretary of Labor and to the courts for interpretation and application in case disputes do arise." *Id.* at 759.

[36] 104 Cong. Rec. 11486-87 (1958).

Kennedy-Ives bill but which "did not affect the theory or basic subject matter of the measure." [37] The bill retained the provision for enforcement of election regulations by the Secretary of Labor, as did S.1002, a more detailed bill introduced by Senator Mundt, and S.1137, introduced by Senator McClellan.[38] The Administration bill, S.748, provided for enforcement of election procedures through suits by individual members in those instances in which the Secretary chose not to sue.[39] Yet it is of especial significance to this case that all of these bills provided that violations be redressed by setting aside improper elections and conducting rerun elections under the supervision of the Secretary.[40] Additionally, S.505 and S.1002, the only two proposals to address the question of the rules to be utilized in a court-ordered rerun election, specifically authorized the Secretary to prescribe such rules.[41]

The bill reported by the Labor Committee, S.1555, provided for enforcement suits by the Secretary only, and vested in the Secretary authority to supervise rerun elections and to prescribe election rules and regulations.[42] It reflected the Committee's belief "that the broad powers

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[37] Cox, *Internal Affairs of Labor Unions Under the Labor-Reform Act of 1959*, 58 Mich. L. Rev. 819, 822 (1960) [hereinafter, *"Cox"*]. Professor Cox was a member of the Labor Law Advisory Panel which assisted the Senate Labor Committee in the drafting of its bill, S.1555. DL Leg. Hist. at 95.

[38] I Leg. Hist. at 154-55, Section 7 (S. 1002); and at 309-310, Section 404 (S. 1137).

[39] *Id.* at 112, Section 302(d).

[40] *Id.* at 63 (S. 505); 155 (S. 1002); 310 (S. 1137); 129 (S. 748).

[41] *Id.* at 63 (S. 505); 155 (S. 1002).

[42] *Id.* at 376, Section 302(b). In introducing the bill, its co-sponsor, Senator Kennedy, noted that the legislation granted the Secretary of Labor "the right to set [an] election aside." II Leg. Hist. at 1113.

granted to the Secretary . . . combined with full reporting and disclosure to union members and the public provides a most effective combination of devices by which abuses can be corrected." [43] Not only did the Committee not diminish the Secretary's authority during the legislative process, but, to the contrary, it significantly expanded that authority by assigning the responsibility of supervising unions' recall election procedures to the Department of Labor.[44] The proposal contained in S.1555 to utilize the Secretary of Labor as the sole and exclusive agent to enforce regulations governing the election of officers provoked no debate in the Senate.

All of the major bills in the House incorporated the Senate's provision requiring that rerun elections be conducted by the Secretary.[45] The bill approved by the House required that any new election ordered by a district court was to be conducted by the Secretary, although it also contained a provision allowing for post-election suits to be brought by individual members seeking to set aside an election.[46] In conference, the Senate's enforcement procedure which relied entirely upon the Secretary to determine when to bring a suit seeking to set aside an election, was adopted in its entirety.[47]

This legislative review establishes that, in both chambers, the Secretary of Labor was designated as the sole and exclusive government agent authorized to supervise rerun elections of union officers and to fashion appropriate rules for conducting such elections. The proposals

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[43] S. Rep. No. 187, *supra* n.20, at 34; I Leg. Hist. at 430.

[44] *Id.* at 93.

[45] *See*, I Leg. Hist. at 658 (Landrum bill, H.R. 8400); 728 (Elliott bill, H.R. 8342); 907 (Shelley bill, H.R. 8490).

[46] *Id.* at 658.

[47] H. Rep. No. 1147, 86th Cong., 1st Sess., at 35, *printed in Id.* at 939.

for federal pre-election remedies were rejected in favor of post-election relief. Only state causes of action were permitted prior to the conduct of the election.[48] Thereafter, only the Secretary of Labor could bring suit to set aside an improperly conducted election and, once a new election was ordered, the Secretary of Labor was responsible for insuring that it was conducted in accordance with the Act.

B. The Legislative History of Title I

Consistent with the above, the history of Title I provides no support for the First Circuit's conclusion that district courts may supervise rerun elections of officers under that Title. Nor, contrary to the lower court's findings, does the legislative history of Title I evidence Congressional dissatisfaction with either the Secretary of Labor's enforcement abilities or the adequacy of the Title IV enforcement procedures to correct election irregularities (Pet. App. B at 59a, 67a).

1. *The "Basic Rights" Protected*

Title I was adopted in order to guarantee rights not otherwise specifically protected in the legislation. One of the major criticisms of the 1958 Kennedy-Ives bill was that it allegedly failed to afford members the minimum standards of democracy necessary to ensure them an opportunity to participate in "vital union decisions" other than the election of officers.[49] Issues for which no right to vote was provided included bylaw amendments, strike questions, and contract proposals.[50]

The introduction of S.505 in 1959 without provisions dealing with these issues led Senator McClellan to in-

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[48] The legislative history of § 403 is discussed at pages 31-33, *infra*.

[49] S. Rep. No. 1684, *supra* n.30, at 52-53.

[50] *Id.* at 56-57; *see*, DL Leg. Hist. at 714 (Sen. Knowland).

troduce S.1137 which included a title, denominated "Rights to Be Guaranteed In Charters of Labor Organizations," covering many of the subjects included in Title I of the current law.[51] When S.1137's "basic rights" provisions were rejected by the Senate Labor and Public Welfare Committee which reported S.1555, Senator McClellan offered those provisions on the floor of the Senate as an amendment to S.1555 in order to "define and describe those rights, which are basic, and which every citizen of the country is entitled to."[52] In so doing, the Senator affirmed his adherence to the basic philosophy of legislative restraint which had guided the Senate in its formulation of the legislation to that point. He described the contents of his amendment as the "minimum standards of democratic processes," "the very minimum," "the basic principles" required to address specific abuses disclosed during his committee's hearings.[53]

The legislative debate which ensued focused on the role of the federal government in protecting private rights in relation to the responsibilities of the states. The opponents of the McClellan amendment adhered to the view that existing state laws, supplemented by the protections incorporated in S.1555, were adequate to protect the "basic rights" covered by the amendment.[54] They attacked the McClellan proposal for its breadth, alleging that the amendment would transform a Congress committed to limited intervention in the affairs of private organizations into "a constitutional convention for the free labor movement in the United States," and was unnecessary in view of the bill's incorporation of the protection afforded by existing law.[55] The proponents did not

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[51] I Leg. Hist. at 267-271.

[52] II Leg. Hist. at 1096, 1106.

[53] *Id.* at 1098, 1100, 1103.

[54] *Id.* at 1111-14. (Sens. Kennedy and Morse).

[55] *Id.* at 1111 (Sen. Morse); 1105-06 (Sen. Javits); 1108 (Sen. Johnson).

allege that S.1555 was inadequate in the protections it afforded, asserting instead that additional areas of union affairs had to be governed by federal legislation.[56] In short, there is nothing in the legislative debate which suggests that the McClellan amendment was intended to provide union members with additional means of enforcing the bill's safeguards concerning the mechanics of union elections of officers.

The McClellan amendment, adopted by a vote of 47-46 on April 22, 1959, represented the high-water mark of proposed federal regulation of internal union affairs.[57] It was replaced in its entirety two days later by the more moderate proposal of Senator Kuchel designed to "remove the extremes raised by the [McClellan] amendment." [58] As with the McClellan amendment, the debate over the Kuchel substitute evidences that it was intended to articulate "fundamental" rights, not supplement the more specific provisions of the bill which addressed particular problems. Significantly, questions which arose during the course of the debate concerning application of the generalized statements in the "bill of rights" to specific officer-election issues were resolved by referring to the more detailed procedures contained in the section of the bill containing the regulations for elections of officers.[59] The House subsequently approved this compromise "bill of rights" without even considering it in committee.[60]

2. *The Title I Enforcement Scheme*

The difference between the McClellan and Kuchel amendments which is most crucial to this case is that

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[56] *Id.* at 1113. (Sen. Carroll).

[57] *Aaron, supra* n.28, 73 Harv. L. Rev. at 859.

[58] II Leg. Hist. at 1234 (Sen. Cooper); *See also, Aaron, supra* n.28, 73 Harv. L. Rev. at 859-60.

[59] II Leg. Hist. at 1232-33.

[60] *Cox, supra* n.37, 58 Mich. L. Rev. at 832-33.

enforcement of Title I rights under the former was vested in the Secretary of Labor, while the latter proposal permitted individual union members to file suit.[61] The First Circuit erroneously cited the adoption of the Kuchel amendment's private enforcement scheme as an indication of Congressional mistrust of the Secretary of Labor's ability to enforce the "bill of rights" and as evidence that Congress considered the "bill of rights" provisions to be of greater importance than the Title IV election provisions (Pet. App. B at 59a, 61a, 63a, 67a).

Such conclusion ignores the Senate's concern that the McClellan amendment would establish a precedent of federal government enforcement of the rights of private individuals. Southern Senators in particular were outspoken in their belief that such a proposal would create a precedent for federal enforcement of civil rights matters.[62] It is indicative of the extent of that concern that the first Senator to discuss the substantive advantages of the Kuchel amendment addressed precisely that issue.[63]

The legislative debate also belies the circuit court's suggestion that Congress was concerned that the Secretary would not diligently enforce the statute. On the contrary, several Senators expressed support for the Kuchel amendment's private enforcement scheme precisely because they believed that the Secretary would become too involved in the affairs of unions under the McClellan proposal.[64] Indeed, Congress' continued faith in the Secretary's ability to perform the tasks assigned by the bill is confirmed by the Senate conferees' insistence

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[61] *Compare*, II Leg. Hist. at 1102 (Section 103) *with* 1221 (Section 102).

[62] *Aaron, supra* n.28, 73 Harv. L. Rev. at 859.

[63] II Leg. Hist. at 1223-24 (Sen. Johnston). Ultimately, all of the Southern Senators, including Senator McClellan voted for the Kuchel substitute. *Aaron, supra* n.28, 73 Harv. L. Rev. at 859.

[64] II Leg. Hist. at 1238 (Sens. Javits and Kefauver).

during the conference with the House that the Secretary, rather than individuals, be given exclusive authority to file suits for election violations. The final bill included such provision.

Nor does the legislative history support the circuit court's conclusion that Title I rights were intended to be superior in importance to those set forth in Title IV. This theory relies upon the mistaken notion that since Title I was added after Title IV was formulated, the Senate adopted the former to buttress the latter. *Kupau* v. *Yamamoto*, 622 F.2d 449, 455 (9th Cir. 1980). As previously noted, Title I was adopted to protect rights not regulated by Title IV. See pages 21-23, *supra*. Additionally, this theory of Title I superiority based upon the timing of its adoption by the Senate ignores the significant modifications made to the election title after the McClellan and Kuchel "bill of rights" amendments were adopted.[65]

In short, the adoption of a private enforcement scheme for Title I was entirely unrelated to any fears that the Secretary of Labor was incapable of acting in this area or that Title I rights were more important than, or a supplement to, Title IV's guarantees. The legislative history clearly reflects that Congress was motivated by other concerns in deciding to permit individual union members to file suit under Title I.

C. The Rulings Below Contravene Decisions of This Court Which Have Interpreted The LMRDA Based On The Intent of Congress As Expressed In The Act and The Legislative History

This review of the legislative history confirms that Title IV, not Title I, is the special "vehicle" through which Congress sought to insure democracy in elections

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[65] See, II Leg. Hist. at 1123 (Sen. Dodd); 1159-60 (Sen. McClellan); 1208-09 (Sen. Morse); 1240-42 (Sen. Javits); 1245, 1253-54 (Sen. Mundt).

of union officers. *Wirtz* v. *Hotel Employees Union*, 391 U.S. 492, 498 (1968). Title I was not intended to be an alternate "enforcement mechanism" for redressing election violations, as the lower court found here (Pet. App. A at 10a). Rather, the exclusive federal remedy adopted by Congress to resolve disputes concerning elections of officers was for the union to conduct a supervised election. *Wirtz* v. *Glass Bottle Blowers*, 389 U.S. 463, 475 (1968). Moreover, the legislative history leaves no doubt that the sole agent selected by Congress to supervise that rerun election was the Secretary of Labor, not a district court or its designee. *Calhoon* v. *Harvey*, 379 U.S. 134, 140 (1964). Only by conducting a rerun election under the Secretary's supervision could the effects of an improper election be purged. *Glass Bottle Blowers*, 389 U.S. at 474.

Permitting broad Title I relief in an election context ignores the deliberate rejection by Congress of proposals for federal pre-election remedies in favor of the post-election mechanisms set forth in §§ 402 and 403. Those procedures further the "long-standing policy against unnecessary governmental intrusion into internal union affairs," *Glass Bottle Blowers*, 389 U.S. at 470-71, a policy which recognizes that, even under the best of circumstances, such elections are disruptive of the normal conduct of a union. *Hodgson* v. *Local Union 6799, USWA*, 403 U.S. 333, 339 (1971). By channelling election protests through the union's internal review processes, the Act affords the union an opportunity to redress any violation and avoids government interference unless and until the union has failed to act. *Glass Bottle Blowers*, 389 U.S. at 472. Thereafter, the Secretary of Labor is authorized to screen frivolous complaints and centralize in a single proceeding such litigation as might be warranted. *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 532 (1972). The remedy was intended to prevent a union member from delaying the conduct of an election of officers, *Calhoon*, 379 U.S. at 140, and to expeditiously

resolve election challenges which cloud the incumbents' title to office. *Glass Bottle Blowers*, 389 U.S. at 468 n.7. Not even the most ardent critics of the *Calhoon* decision have contested the Secretary of Labor's sole and exclusive authority to conduct rerun elections or suggested the availability of such relief under Title I.[66]

Nonetheless, the lower court interpreted more recent decisions of this Court as inviting greater judicial activism in union election disputes (Pet. App. B at 52a). Yet neither *Trbovich*, nor *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), can be read as undercutting *Calhoon*. Nor do they authorize the lower court to entertain private enforcement suits intended to harass an offending union.[67]

In *Trbovich*, this Court held that § 403 did not preclude a union member from intervening in a suit filed by the Secretary but, consistent with the statutory scheme, severely restricted the intervenor's role so that it "did not interfere with the screening and centralizing functions of the Secretary." 404 U.S. at 532-33. And the *Bachowski* decision merely required the Secretary to issue a statement of reasons for not filing suit in response to a member's § 402 complaint, the Court finding nothing in the legislative history reflecting a Congressional intent to exempt such decisions from judicial review. 421 U.S. at 567-68. However, the Court limited the scope of judicial inquiry, specifically rejecting the lower court's authorization of a "trial-type inquiry into the factual bases of the Secretary's conclusion that no violations oc-

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[66] *See, e.g., Pre-Election Remedies Under the Landrum-Griffin Act: The "Twilight Zone" Between Election Rights Under Title IV and the Guarantees of Titles I and V*, 74 Col. L. Rev. 1105, 1114 (1974); Harris, *Titles I and IV of the LMRDA: A Resolution of the Conflict of Remedies*, 42 U. Chi. L. Rev. 166, 168, 177 (1974).

[67] Pet. App. B at 52a; *Bunz* v. *Moving Picture Mach. Operators' U.*, 567 F.2d 1117, 1124 (D.C. Cir. 1977); *Kupau* v. *Yamamoto*, 622 F.2d 449, 456 (9th Cir. 1980).

curred affecting the outcome of the election." *Id.* at 566, 572-73.

Rather than undercutting the argument in favor of narrow Title I relief in election-related suits, both cases reaffirm the validity of the *Calhoon* decision. Of direct relevance to the instant case, *Trbovich* cited *Calhoon* as prohibiting "union members from initiating a private suit to set aside an election," 404 U.S. at 531, the remedy sought and obtained by plaintiffs here.[68] And *Bachowski* limited suits "concerning the conduct of the election itself . . . to the post-election procedures specified in 29 U.S.C. § 482." 421 U.S. at 566.

The most recent decisions of this Court continue to identify Title IV, not Title I, as the source of remedies for election violations. In *Steelworkers* v. *Sadlowski*, —— U.S. ——, 72 L. Ed.2d 707, 714 (1982), the Court reaffirmed that the legislative history revealed that Title I was intended to provide general protections for basic rights not specifically spelled out in other portions of the bill, not to supplement the election provisions already set forth in what is now Title IV. Indeed, in *Finnegan* v. *Leu*, —— U.S. ——, 72 L.Ed.2d 239, 246 n. 10 (1982), the Court noted that the only specific attempt on the floor of the Senate to strengthen the enforcement provisions regarding union elections was contained in an amendment to § 506 of the bill, the precursor of § 609 of the Act.[69]

Not only is the lower court's interpretation of the legislative history inconsistent with the decisions of this

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[68] From the outset, plaintiffs here have recognized that if the district court granted the relief requested, the Union would be required to conduct a new election (JA 80).

[69] That amendment, proposed by Senator Prouty after the McClellan amendment was adopted, would have imposed criminal penalties for violations of Title IV. II Leg. Hist. at 1116, 1140. The amendment was rejected by the Senate. *Id.* at 1141.

Court but the public policy reasons advanced as justification for extensive judicial intervention in union elections under Title I constitute an attempt to substitute the lower court's judgment for that of the Congress.[70] The appellate court's primary concern is that without pre-election federal remedies for election misconduct, rights which may be characterized as arising under Title I will not be enforced unless it can be mathematically determined that any violation "may have affected the outcome of the election" (Pet. App. B at 65a-66a). That concern has been expressed in a law review article cited by the lower court[71] and reflects the concerns advanced by the ACLU during the legislative debate. As we have seen, Congress repeatedly rejected the ACLU's proposals for federal pre-election relief. Moreover, unlike the question addressed in the law review article, the issue in this case is not whether a district court has *any* authority to remedy Title I violations in a pre-election context but, rather, whether that authority extends so far as to include ordering a union to rerun its election.

Congress specifically stated that it did not want the extraordinary remedy of rerunning elections of officers triggered by "technical" violations of the statute. *Wirtz* v. *Hotel Employees Union*, 391 U.S. at 505 n.11. For that reason, the Secretary was charged with the dual role of determining whether a violation occurred and whether the violation "may have affected the outcome" of

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[70] Moreover, many of those policy reasons were advanced in Congress, primarily by the ACLU, in support of proposals granting more extensive pre-election remedies, and were repeatedly rejected. See, Aaron and Komaroff, *Statutory Regulation of Internal Union Affairs*, *supra* n.27, 44 Ill. L. Rev. 631; Rothman, *Legislative History of the "Bill of Rights" for Union Members*, *supra* n.27, 45 Minn. L. Rev. at 201-03; *The Election Labyrinth: An Inquiry Into Title IV of the LMRDA*, 43 N.Y.U.L. Rev. 336, 358 (1968).

[71] Pet. App. B at 65a; Note, *Union Elections and the LMRDA: Thirteen Years of Use and Abuse*, 81 Yale L.J. 407 (1972).

an election.[72] Yet if the Secretary was explicitly not empowered to set aside an election for minor technical violations of the statute, it is totally unreasonable for the lower court to conclude that Title I implicitly granted that authority to a district court. Even the most fundamental rules of statutory construction require that "a matter specifically dealt with in another" part of a statute governs a section of the same act which deals generally with the issue. *MacEvoy Co.* v. *United States*, 322 U.S. 102, 107 (1944). And here, it is clear that the provisions of Title IV more specifically address election issues than the individual right provisions of Title I.

D. Conclusion

The lower court's expansive vision of a district court's role in fashioning Title I relief in the context of an election of officers is directly contrary to the legislative history and ignores the unanimity with which members of both Houses of Congress vested the responsibility for supervising union elections in the Secretary of Labor. No other court has ventured so far as to suggest that the exclusive Title IV remedy of conducting a rerun election can be ordered by a district court acting under Title I. Affirmance of the lower court here will, of necessity, create judicial remedies for election violations which were repeatedly rejected by Congress. The lower courts' holdings usurp the Secretary's authority and erode the protection for both members and unions which were carefully and deliberately incorporated in the statutory enforcement scheme.

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[72] That task has been facilitated by this Court's determination that establishment of a statutory violation creates a presumption that it affected the election's outcome. *Hotel Employees Union*, 391 U.S. at 507.

II. AN ELECTION IS "CONDUCTED" ONCE THE RELIEF REQUESTED NECESSITATES THE VOIDING OF BALLOTS AND THE RERUN OF THE ELECTION

Disregarding this Court's admonition that, in interpreting the LMRDA, courts "must look to the objectives Congress sought to achieve, and avoid placing great emphasis upon close construction of the words," [73] the lower court focused on the phrase "already conducted" in § 403 to determine whether the district court had jurisdiction over the Complaint in this case (Pet. App. B at 61a-67a). After conceding that the "legislative history on this point is unclear," *Id.* at 62a, the lower court concluded, based primarily on questions of public policy, that an election is not "already conducted [until] all the ballots are counted." *Id.* at 67a. Thus, according to the First Circuit, the district court was able to retain jurisdiction in this case by issuing a temporary restraining order at 4:20 p.m. on December 12, 1980, which enjoined the collection and tabulation of mail ballots scheduled for 9:00 a.m. on December 13. Neither the legislative history nor concerns of public policy warrant such a conclusion.

A. The Legislative History of § 403

As we have already shown, the major debate over the precursors to § 403 concerned the extent to which the new federal legislation would pre-empt existing state laws regulating union elections. S.3974, introduced in 1958, pre-empted all state laws and precluded private court litigation over election violations.[74] The Kennedy-Ervin bill, S.505, contained similar language when introduced in 1959,[75] but the bill which emerged from the Labor and Public Welfare Committee preserved existing

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[73] *Glass Bottle Blowers*, 389 U.S. at 468 and n.6.

[74] S. Rep. No. 1684, *supra* n.30, at 13.

[75] I Leg. Hist. at 64 (§ 303).

state remedies "prior to the conduct" of an election. Thereafter, federal remedies were to be exclusive.[76] These changes were adopted at the urging of the ACLU, among others, to preserve the availability of state courts to provide prompt relief for specific violations in order to avoid the more extreme remedy of rerunning an entire election in response to a post-election complaint.[77]

Since neither side of the controversy focused on the point at which an election was "conducted," although both agreed that the purpose of § 403 was to preserve existing state remedies, it is pertinent to consider the remedies available in state courts in 1959. Such a study was undertaken by Professor Clyde Summers in a survey of decisions rendered by state courts in New York during a ten year period.[78] His findings confirm that the state courts were active in adjudicating union election disputes arising before the start of the voting but were reluctant to interfere in elections already in progress where the effect of any relief would require that a new election be conducted.[79] Of particular importance in the instant case is Professor Summer's observation that "casting ballots is not the beginning but the culmination of the election process" [80] and his conclusion that "most suits brought during the period of balloting by mail should be considered as post-election, for the defect may be beyond cor-

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[76] *Id.* at 378 (§ 303).

[77] Summers, *Preemption and the Labor Reform Act-Dual Rights and Remedies*, 22 Ohio State L.J. 117, 136-37 (1961).

[78] Summers, *Judicial Regulation of Union Elections*, 70 Yale L.J. 1221, 1223 (1961). Summer's findings were presented to the Senate Labor and Public Welfare Committee during its hearings in 1958. *Union Financial and Administrative Practices, Hearings Before the Senate Subcommittee on Labor and Public Welfare*, 85th Cong., 2d Sess. 610 (1958) (statement of Clyde Summers).

[79] Summers, *Judicial Regulation of Union Elections*, 70 Yale L.J. at 1244-45, 1247.

[80] *Id.* at 1243.

rection and any remedy would require a new election." [81] These conclusions are consistent with the observations of the district court here, as well as of the arbitrator assigned by the court to conduct the rerun election, to the effect that most members who vote in a mail ballot election do so immediately upon receipt of the balloting materials (R. 580-81). The instant lawsuit was filed after the mail ballot packages had been distributed to the Local Union's membership and balloting had commenced.

Based on the legislative record, it is appropriate to conclude that Congress only intended to preserve those state remedies then available, and to create federal remedies where it was necessary to set aside an election, once such relief became the only means of redressing a violation of the union's bylaws or statute. The absence of specific federal remedies for pre-election violations, with the exception of § 401(c), leads to the inescapable conclusion that the remedies set forth in the Act are exclusive.[82] Moreover, since the remedy of conducting a rerun election is set forth in Title IV and is the exclusive federal remedy for election violations, any election must be considered "already conducted" at the point at which the requested relief necessitates the conduct of a new election. Plaintiffs concede that at the time this suit was filed that point had been reached, inasmuch as the relief requested required a new election to be held. (JA 80)

B. The Public Policy Concerns

The Circuit Court asserted that its statutory construction would assist in the accomplishment of the legislative goals discussed previously. Yet the other courts which

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[81] *Id.* at 1247 n.143. Professor Summers has long championed federal pre-election remedies, referring to them as "the only ones of any practical value." *Id.* at 1248. *See also*, 22 Ohio State L.J. 119, *supra* n.77.

[82] *The Election Labyrinth: An Inquiry Into Title IV of LMRDA*, *supra* n.70, 43 N.Y.U. L. Rev. at 358.

have considered the question of when the exclusivity of § 403 attaches have agreed that these legislative goals are more likely to be satisfied if an election were considered to have been "already conducted" at some point before the conclusion of the ballot tabulation. Such an interpretation has been found to be consistent with this Court's decision in *Calhoon* and to satisfy the "general congressional policy . . . to allow unions great latitude in resolving their own internal controversies" as well as to utilize the Secretary of Labor's expertise to redress violations not remedied by the unions. *Jennings* v. *Carey*, 57 L.R.R.M. 2635, 2641 (D.D.C. 1964). The Court of Appeals for the Second Circuit has held that pre-tabulation complaints resulting from "practices subsequent to the nomination and voting" must be resolved under § 402. *Libutti* v. *DiBrizzi*, 337 F.2d 216, 218 (2d Cir. 1964). *Cf. Robins* v. *Rarback*, 325 F.2d 929 (2d Cir. 1963), *cert. denied*, 379 U.S. 974 (1965) (federal courts should not entertain pre-election complaints which require an election to be set aside). And the Third Circuit has agreed that any definition of "conducted" which postpones the exclusivity of § 403 until after the ballots have been tabulated would increase the probability of judicial interference in an area specifically reserved for the Secretary. *McDonough v. Local 825, Operating Engineers*, 470 F.2d 261, 264 (3d Cir. 1972).

In elections which utilized mail ballots, such as the instant case, the only courts which have considered the point at which an election has been "already conducted" have followed the state law as it existed in 1959 [83] and concluded that judicial intervention must be precluded "after the actual voting process is under way." *Laski* v. *Intern. Org. of Masters, Mates & Pilots*, 502 F. Supp. 134, 136 (S.D.N.Y. 1980); *New Action Coalition* v. *Local 2, United Fed. of Teachers*, 510 F. Supp. 1208, 1211 (S.D. N.Y. 1981). Those courts have held that for a court to

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[83] *See* note 81, *supra*.

reach the merits of a case "after the election has advanced to the voting state opens the door to significant federal court interference in union election practices . . . a result inconsistent with the policies of Title IV." *Laski*, 502 F. Supp. at 136.

This case amply demonstrates the wisdom of such judicial restraint. The district court's decision to grant a temporary restraining order in this case was issued not merely "after the actual voting process [was] under way", but after every phase of the election, with the exception of the actual ballot tabulation, had been completed.

Consequently, the mechanistic finality of counting the ballots after the election was run, and the announcement of results, was delayed for an entire year while the district court investigated the alleged violations and then attempted to fashion election procedures without the benefit of the expertise of the Secretary of Labor, two events which Congress specifically intended to avoid. *Calhoon* v. *Harvey*, 379 U.S. at 140. During the delay, the Local Union was run by lame duck officers, an eventuality Congress recognized as a reason for precluding federal pre-election relief.

The election subsequently conducted by the district court was unusually burdensome to the Union and its members not only in terms of the delay, but also in its expense. While a union is not charged for the expenses incurred by the Secretary of Labor in conducting a rerun election, in the instant case, this 700 member local union was required to pay the third parties appointed by the district court a total of $7374.96 (JA 15, June 2) for their services,[84] exclusive of the cost of printing and mail-

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[84] This cost, in excess of $10.00 per member, is in contrast to the cost incurred by unions which have voluntarily retained third party supervisors to conduct their elections (approximately $2.00 per ballot). (Brief App. at 7a-9a).

ing the balloting materials. In addition, the district court currently has under consideration an application for attorney fees in the amount of $60,000.00 which was filed by plaintiffs' counsel before the appeal to the First Circuit. (Brief App. at 2a-5a)

This Court has recognized in other contexts the necessity of protecting the financial viability of unions. *IBEW* v. *Foust*, 442 U.S. 42, 50-51 (1979). Those concerns are no less valid here. Indeed, the expenses borne by the Union here are even more unreasonable than in the average "duty of fair representation" case since all of the relief provided to these plaintiffs could have been obtained without cost to them, and at minimal cost to the Union, had they utilized the procedures set forth in § 402.

Moreover, the burdens imposed by this case could have been greatly compounded had additional suits been brought by other members or had the Secretary decided to bring an independent suit in response to a separate post-election complaint filed under § 402. Without the Secretary to perform the screening and consolidation functions assigned by Congress,[86] there is nothing to prevent a multiplicity of lawsuits involving a single election. In each of the cases cited below, pre- and post-election litigation resulted from the district court's decision to consider pre-election complaints which had been carefully drafted to include an allegation that Title I rights had been violated in the context of a union's election of officers. *Kupau* v. *Yamamoto*, 622 F.2d at 452-3; *Colpo* v. *Teamsters, Local 326*, 504 F. Supp. 573, 574 (D. Del. 1980), *aff'd*, 659 F.2d 399 (3d Cir. 1981); *Rollison* v. *Hotel Employees, Local 879*, 677 F.2d 741, 743 (9th Cir. 1982).

Despite these concerns, the circuit court cited several reasons for utilizing Title I to grant pre-election relief. The circuit court asserted that Title I gave a district court greater flexibility to correct violations in a pre-

[86] *Trbovich* v. *United Mine Workers*, 404 U.S. at 532.

election context than the post-election remedies available under Title IV.[86] Regardless of the merits of this argument, it ignores the axiom that the courts are not free to substitute their judgment for that of the Congress or to modify the legislative scheme merely because, in the court's view, another procedure would be more effective.[87] To the extent that the lower court's "flexibility" argument reflects some commentators' discontent with the Secretary of Labor's performance of the tasks assigned by the Act (Pet. App. B at 65a-66a), it is apparent that such complaints must be remedied by legislative action or litigation compelling the Secretary to carry out his statutory responsibilities.[88] *UAW* v. *Nat. Right To Work*, 590 F.2d 1139, 1155 (D.C. Cir. 1978). Simply stated, such statutory revisions must be left to the Congress, not the courts.

The circuit court's interpretation of § 403 will delay the Secretary of Labor's exclusive jurisdiction over election complaints and afford district courts the maximum opportunity to examine the technical details of union elections. Members seeking to avoid the Title IV enforcement

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[86] Pet. App. B at 66a. The lower court's contention that Title I rights will not be enforced unless a violation can mathematically have affected the outcome has been discussed previously. *See*, p. 29-30 *supra*.

[87] A prime example is the lower court's suggestion that voting fraud could be remedied prior to the completion of an election by requiring the union to distribute additional ballots, thus avoiding having to conduct a new election to correct such a violation. Yet, Congress specifically anticipated the possibility of such a violation and deliberately chose the post-election procedures of § 402 to be utilized to provide a remedy. II Leg. Hist. at 1140. (Sens. Kennedy and Prouty).

[88] Moreover, the appellate court has overlooked the considerable flexibility vested in the Secretary and the courts in fashioning Title IV relief after an election violation has been established. *Usery* v. *Local 639, IBT*, 543 F.2d 369, 387-88 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1123 (1977).

mechanisms will be encouraged to race to the courthouse and file a complaint under Title I before the last ballot is counted. Indeed, in *Jennings* v. *Carey*, 57 L.R.R.M. at 2636, the suit was filed after all but 6,000 of some 130,000 ballots were tabulated, while in *McDonough* v. *Local 825, Operating Engineers*, 470 F.2d at 263, the complaint sought to enjoin the recount of certain challenged votes.[89] Applying the First Circuit's rule would have extended Title I jurisdiction to both complaints.

The effect of the lower court's ruling is that most violations now processed by the Secretary could be construed to lie within the jurisdiction of Title I, since the vast majority of such complaints involve events which occur prior to the completion of the ballot tabulation. The only statutory requirements with which a union must comply after the tabulation are posting of the results and preservation of the ballots. § 401(e), 29 U.S.C. § 481(e). All of the remaining Title IV obligations attach prior to the completion of the ballot count and skillful attorneys should be capable of cloaking a violation of one of those provisions in Title I rhetorical garb. *Driscoll* v. *Int'l U. of Op. Eng., Local 139*, 484 F.2d 682, 686-87 (7th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974).

Moreover, even were a court to assert Title I jurisdiction to review a union election, the court's examination must necessarily be carried out within the framework of Title IV, for the simple reason that only Title IV specifies election standards against which the union's actions may be measured.[90] Yet, as then-Solicitor General Archi-

---

[89] The Third Circuit has recently characterized *McDonough* as a "suit filed post-election but before ballots were counted." *Kraska* v. *United Mine Workers*, 686 F.2d 202, 206 (3d Cir. 1982).

[90] In the instant case, when it came time for the district court to specify election procedures for the Local Union to utilize in the rerun election, the discussion concerned Title IV's requirements and the Secretary of Labor's interpretive guidelines. 29 C.F.R. § 452.1 *et seq.* (R. 578-79, 582-83).

bald Cox noted in the Government's amicus brief in *Calhoon* v. *Harvey*, allowing the district courts to bypass the Secretary of Labor and interpret Title IV's regulations

> would mean that these sensitive questions could be brought directly before the federal courts in pre-election actions with the result that all elections might be precluded for an extended period of time while litigation was resolved and appealed. Such an intent should not be attributed to a Congress which enacted this statute [LMRDA] to require, not delay, elections and which took such pains to limit pre-election remedies.

The construction of the phrase "already conducted" utilized by the First Circuit would facilitate such disruptive intrusions in union affairs. It is inconsistent with the legislative history and the decisions of other circuit courts of appeals which have considered the question. It substitutes the court's judgment for that of Congress and grants remedies judicially which various interest groups were unable to obtain legislatively in 1959. By delaying the attachment of the exclusivity of Title IV, the lower court encourages individual union members to circumvent the administrative procedures of Title IV, consequently embroiling the district courts in lengthy, politically charged litigation over the technical details of union elections.

It is submitted that the election in this case was "already conducted" at the time suit was filed, because the balloting process had already commenced and the relief requested required the voiding of ballots and the conduct of a new election. Consequently, the district court lacked jurisdiction to act under Title I, as the exclusive remedy was prescribed by Title IV.

CONCLUSION

For the reasons set forth above, a district court should not be permitted to grant relief requiring a union to conduct a new election of officers, whether the court acts on the predicate that it has legitimate Title I jurisdiction or based on the claim that an election had not been "already conducted." The decision below should be reversed, and the case should be remanded with instructions that the Complaint be dismissed, the injunctions issued dissolved, and the ballots cast in the December 13, 1980 election released to the Local Union.

Respectfully submitted,

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APPENDIX

APPENDIX

NOTICE OF RESCHEDULING OF HEARING ON CONTEMPT AND CONFERENCE ON ATTORNEYS' FEES

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETS

No. CA 80-2680-K

JEROME CROWLEY, *et al.*

v.

LOCAL 82, *et al.*

TAKE NOTICE that the above-entitled case has been RESCHEDULED FOR HEARING AND CONFERENCE at 3:00 p.m., on Thurs., March 31, 1983, at U.S. District Court, Courtroom #11, Third Floor, U.S. Courthouse, Post Office Square, Boston, MA 02109.

Date February 24, 1983

GEORGE F. MCGRATH
Clerk

By /s/ Ellen M. Hayes
ELLEN M. HAYES
Deputy Clerk
Tel. 223-1638
223-2845

To Kurt Pressman, Esq.
Benjamin Hiller, Esq.
Mark Stern, Esq.
Kathryn N. Noonan, Esq.
Gary S. Witlen, Esq.
Paul H.J. Keenan, Esq.
Lawrence E. Katz, Esq.
Donald J. Wood, Esq.

[1]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Citation Omitted in Printing]

PLAINTIFFS' MOTION FOR AN AWARD OF LEGAL FEES

Now come the Plaintiffs in the above entitled action and move for an award of attorneys fees to be made to them or their counsel in this action in the first instance against the Defendants Griffiths and Harris, and/or in the second instance against the Defendant Local 82 for the services provided by their counsel in obtaining preliminary injunctive relief required on account of said Defendants unlawful conduct and benefiting all the members of said union.

And for their reasons they incorporate the facts and reasons set forth in the appended Affidavits and Verified Time and Expense Records [2] appended hereto, and the further reasons set forth in their accompanying Memorandum of Law.

The Plaintiffs state that said Affidavits and records contain information as set forth below:

1. That the Attorneys performed services for the Plaintiffs in the following separate categories:

(a) services rendered solely to obtain the relief granted Plaintiffs by the Court;

(b) services rendered to obtain said relief and to seek other relief, which was not afforded Plaintiffs by the Court;

(c) services rendered solely to seek relief which was not afforded to the Plaintiffs by the Court; and

(d) services rendered solely to preserve the relief which was granted to the Plaintiffs by the Court.

2. That these services required the expenditure of the following numbers of hours by the following Attorneys and other persons, divided into the several categories described in paragraph #1 above:

MARK STERN

(a) 170.9
(b) 80.6
(c) 5.6
(d) 5.0

KURT PRESSMAN

(a) 90.5
(b) 38.4
(c) 10.0
(d) 5.2

BENJAMIN HILLER

(a) 156.8
(b) 48.5
(c) 19.5
(d) 4.2

DARCY DUMONT

(a) 58.6
(b, c & d) none

JAMISON BELL

(a) .2
(b) none
(c) 5.6
(d) none

EILEEN BRADY AND CAROL CALLIOTTE

(a) 12.3
(b, c & d) none

[3]

3. For these services, the Plaintiffs request compensation at the following rates and in the following amounts for the following Attorneys and other persons, according to the several categories described in paragraph #1 above:

MARK STERN

(a)	$100.00/hr.	$17,090.00
(b)	$70.00/hr.	$5,642.00
(c)	$30.00/hr.	$168.00
(d)	$100.00/hr.	$500.00

KURT PRESSMAN

(a)	$80.00/hr.	$7,240.00
(b)	$50.00/hr.	$1,920.00
(c)	$25.00/hr.	$250.00
(d)	$80.00/hr.	$416.00

BENJAMIN HILLER

(a)	$60.00/hr.	$9,408.00
(b)	$40.00/hr.	$1,940.00
(c)	$20.00/hr.	$390.00
(d)	$60.00/hr.	$270.00

DARCY DUMONT

(a)	$35.00/hr.	$2,051.00
	(b, c & d) none	

[4]

JAMISON BELL

(a)	$20.00	$4.00
	(b) none	
(c)	$7.50	$135.00
	(d) none	

EILEEN BRADY AND CAROL CALLIOTTE

(a)	$10.00	$123.00
	(b, c & d) none	

4. Hence Plaintiffs request that the following amounts be determined to be the appropriate "lodestar" amount of legal fees determined to be applicable under this motion by the Court:

(a)	$35,916.00
(b)	$9,502.00
(c)	$135.00
(d)	$943.00

Total $47,547.00 Lodestar

5. For the reasons set forth in their Memorandum of Law, the Plaintiffs request that the Court award a total of $60,000.00 in fees to Plaintiffs or their Attorneys, which number includes the amounts set forth hereinafter for expenses made by them related to this litigation:

Filing fee:	$60.00
Duplicating costs:	$200.00
Delivery charge:	$30.00

By their counsel

/s/ Mark D. Stern
MARK D. STERN

/s/ Kurt M. Pressman
KURT M. PRESSMAN

/s/ Benjamin Hiller
BENJAMIN HILLER

Goldstein, Pressman and Stern
678 Massachusetts Avenue
Cambridge, Ma. 02139
(617) 492-2211

CERTIFICATE OF SERVICE

I Kurt M. Pressman, swear under the pain and penalty of perjury that I have caused a true and accurate copy of the following:

1. Motion for Award of Legal Fees;

2. Memorandum in Support Thereof;

3. Motion for Order directing Defendants to give an accounting of fees expended.

to be delivered by regular course of mail, postage prepaid to Counsel for the Defendants, Gary S. Witlen, 25 Louisiana Avenue, N.W., Washington, D.C. 20001; and delivering in hand to Counsel for Defendants Katherine Noonan, Esq. at 6 Beacon Street, Boston, Ma. this 26th day of August, 1981.

Signed,

Kurt M. Pressman

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 80-2680-K

JEROME CROWLEY, *et al.*,
Plaintiffs

vs.

LOCAL 82, *et al.*,
Defendants

FURHER HEARING ON EXPENSES AND FEES
BEFORE THE
HONORABLE ROBERT E. KEETON, U.S.D.J.

Courtroom 11
United States Courthouse
Boston, MA 02109
June 2, 1982

• • • •

[82] MR. WITLEN: The union calls Murray Schwartz.

MURRAY SCHWARTZ, duly sworn

DIRECT EXAMINATION
BY MR. WITLEN

Q Mr. Schwartz, could you state your name and address for the record, please?

A Murray Schwartz, 8 Frost Pond, Roslyn, New York, 11576.

Q Mr. Schwartz, are you currently employed?

A Yes, I am.

Q And what is your present place of employment?

A The Honest Ballot Association.

Q Could you tell us what position you hold with that association?

A I'm the president.

Q How long have you been president of the Honest Ballot Association?

A Since October of 1980.

Q Were you employed prior to that time?

A Yes, I was.

[83] Q By whom?

A I was employed as a Commissioner of Commerce and Industry in the City of New York.

Q And were you employed prior to that?

A Yes, I was.

Q In what capacity?

A I was a state senator for the State of New York.

Q During the time that you were a state senator, were you assigned to any particular committee in the senate?

A My committee was the Elections Committee.

• • • •

[87] Q On what basis does the Honest Ballot Association [88] charge a union when it conducts its elections?

A Well, every election is different. We tailer-make them. But when we make a quote on a ballpark figure, we use $2 a vote.

Q You charge on a per-ballot basis?

A Yes, we do.

Q And that figure is what?

A $2 per vote.

• • • •

Court, U.S.
E D
JUL 27 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-432

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LOCAL NO. 82, FURNITURE AND PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN, AND PACKERS; BART GRIFFITHS, SECRETARY-TREASURER, LOCAL NO. 82; GEORGE HARRIS, PRESIDENT, LOCAL 82; PHILLIP PIEMONTESE, CHAIRMAN OF THE ELECTION COMMITTEE OF LOCAL NO. 82; AND JOHN DOE, JAMES DOE and JEROME DOE, MEMBERS OF THE ELECTION COMMITTEE OF LOCAL NO. 82,

Petitioners,

RAYMOND DONOVAN, SECRETARY OF LABOR,

Intervenor,

v.

JEROME CROWLEY, ANTHONY COYNE, JOSEPH FAHEY, ROBERT LUNNIN, JAMES HAYES, GERALD OWENS, JOHN LYNCH, JOSEPH TRASK, JOSEPH MONTAGNA, and DENNIS BATES,

Respondents,

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF RESPONDENTS

MARK D. STERN
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QUESTIONS PRESENTED

1. Should this Court entertain questions presented on a writ of certiorari which have been removed from the litigation by stipulations the petitioning party voluntarily entered into in the district court?

2. Has the instant writ of certiorari been rendered moot on account of the fact that the passage of time and intervening occurrence of events have made it impossible for this Court to afford petitioners any meaningful relief hereon?

3. When a district court has determined that union officials actions have, in the course of an election which union officials subsequently declared to be null and void, abridged members' fundamental democratic rights in violation Section 101 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. s. 411, does Section 102, 29 U.S.C. 412 permit the court to set minimal terms and conditions under which a subsequent election, which the union bound itself to conduct, will be conducted, supervise the conduct of said election and enjoin the reoccurrence of like violations of the Act during the course of said election.?

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

STATEMENT OF FACTS

The Respondents adopt the statement of facts contained in the findings of the District Court (Pet. App. A at 17-21).

PROCEEDINGS BELOW

The Respondents filed a complaint in the U.S. District Court for the District of Massachusetts on December 1, 1980. They alleged that their rights under Title I of the Labor Management Reporting and Disclosure Act, 29 U.S.C. 401 et seq (hereinafter referred to as "the Act" or "the LMRDA") had been violated by the Petitioners before, during and after a November 9, 1980 union meeting to nominate

officers for a scheduled mail ballot election. The Respondents' Complaint asserted four Title I claims pertinent to the issues discussed hereinafter. In summary these claims were that the Petitioner incumbent union officers intentionally interfered with the rights of the Respondents, many of whom had been outspoken critics of the incumbent officers, guaranteed under Sections 101(a)(1), (2) & (5) of the Act, to attend the nomination meeting and express their views on candidates therein:

(1) by discriminatory application of a previously unenforced entrance requirement;

(2) by misrepresenting to them who was eligible to run for office;

(3) by refusing to accept their nomination of a candidate to oppose the principal executive officer of the union; and

(4) by imposing unfair discipline on one of

them in reprisal for his protesting the aforementioned violations of Respondents' rights.

Before all the ballots in the mail election were scheduled to be collected and tallied, the District Court issued a temporary restraining order impounding them.1/ In late December, 1980, the Court conducted five days of evidentary hearings on the Respondents' motion for preliminary injunction, which sought to have the ballots declared void and a lawful nomination meeting held.

After the aforementioned hearings were concluded, but before any action had been taken by the Court, the Petitioners, on January 9, 1981, notified the Court that they had changed their prior position and bound themselves to a voluntary, binding

1. The temporary restraining order of the District Court is not in issue on the instant writ.

written stipulation, which in part stated:

> Teamsters Local 82 is prepared to and will conduct a second nomination and mail ballot election for the election of officers under the following terms, provided the Court permits a change in the status quo preserved by its Order of December 12, 1980...
> Jt. App. at 55 (emphasis added)

Upon close questioning by the Court on two separate occasions the Petitioners emphatically denied they were merely making an offer of settlement, but instead acknowledged that they were making a binding stipulation to annul the ballots impounded by the Court and hold a valid nomination and balloting process 2/ (Jt. App. at 99 & 108-110).

---

2. The record repeatedly affirms that Petitioners' stipulation was not in any sense an offer of settlement that had to be accepted by Respondents to become binding. It was a binding stipulation and became part of a binding court order, which has been effectuated (Jt. App. at 99, 108-110). The transcripts of two exchanges between the Court and counsel for Petitioners make this absolutely clear:

MS. NOONAN: Yes, your Honor. In essence I asked for the conference to let you know that by vote of the executive board last night I was authorized to advise the Court that Local 82 is prepared to run another nomination meeting, another election by mail ballot, send notices out to all members specifying the eligibility requirements for running for office as I set out in the letter...

.....

THE COURT: ...And I am now understanding you to say not that you are proposing, if you will, a settlement which must be accepted as a package or not; rather you are proposing to make some stipulations of record which the Court would now take into account in determining whether it went far enough toward meeting the claims that are asserted that the Court should not intrude with preliminary relief...

MS. NOONAN: Yes, your Honor...

(Jt. App. at 97-99) (emphasis added)

and

MR. WITLEN: At this stage of the proceedings the Defendant's stipulation that was ordered--that was offered in early January have effectively been withdrawn by the failure of the parties to agree that the stipulation is an adequate substitute per order of the Court.

THE COURT: Now, that I do not understand because I questioned you explicitly about whether it was an offer of settlement or a binding stipulation. And I got the answer, "It is a binding stipulation."

MR. WITLEN: As offered, not as modified.

THE COURT: Well, all right, I understand that. One of the things that is very clear from that is that you have stipulated that a new election would be conducted; that the election that was conducted to the nomination meeting of November 9, would not be longer asserted to be valid. Now, are you undertaking to withdraw that stipulation?...

.....

THE COURT: Now, I want to be very clear about this. You presented to me an argument that you were making not an offer of settlement but a binding stipulation, and on the basis of that you argued that I lacked jurisdiction.

MR. WITLEN: That's correct, your Honor...

THE COURT: I think that you are trying to withdraw from a binding stipulation you made when I made it very explicit[, "]I want to know whether it is a binding stipulation or an offer of settlement?["] If it were only an offer of settlement, then the position that you are now taking would be appropriate. I got the other answer. It is not an offer of settlement, it is a binding stipulation, and on the basis of it, an assertion of lack of jurisdiction in this Court to order anything else. I have overruled that assertion. That does not give you an opportunity to withdraw a binding stipulation. If you wish to withdraw that binding stipulation, you are going to have seek my permission and show good cause for doing so, otherwise I will not permit it to be withdrawn...

.....

Based on their stipulations the Petitioners moved that the District Court dismiss the Respondents' complaint on the basis that the stipulations deprived the Court of its jurisdiction. The Court denied this motion (Jt. App. at 105-6).

One of the terms 3/ to which

> MR. WITLEN: It's the Defendant's position that a stipulation was offered. And there were certain terms set forth in that stipulation. The terms for conducting the election have now been modified by the Court. While Defendants will stand by the initial stipulation, the Defendants are not willing to stipulate to the additional terms that are being required--
> THE COURT: That I understand and I'm not suggesting that you are foreclosed in any way from contesting the Court's ordering of somewhat different terms from those you proposed in the stipulation.
> MR. WITLEN: I think that we are now all in agreement, your Honor.
> (Jt. App. at 108-110) (emphasis added)

3. The Petitioners' stipulation contained a number of terms regarding the manner in which the election would be conducted. At the request of the Court further stipulations were filed containing additional terms for incorporation into the Court's order regarding the election to be conducted (Jt. App. 55-60, 76-78 & 104-105).

Petitioners stipulated was that the nomination meeting and balloting they would conduct would be supervised by disinterested members of the next higher entity in the international structure of the Petitioner Union, Joint Council 10 (Jt. App. at 55-60 and 76-78). However, at the next hearing Petitioners advised the District Court that neither Joint Council 10 nor the President of the International Union was willing to undertake supervision of the election to be scheduled, if they would have to be accountable to the Court in doing so (Jt. App. at 106-8), and that

During the course of these hearings Petitioners also advised the Court that Joint Council 10 had reviewed and vacated the discipline imposed on the Respondent Lunnin, and deferred taking any action on Respondents' charges concerning the conduct of the election until Respondents' claims before the District Court were resolved (Pet. App. A at 6).

for this reason Petitioners had no objection 4/ to the Court's appointment of any third party not affiliated with Respondents to do the same (Jt. App. at 110-12).

On July 13, 1981, after leave had been granted by the Court for the Petitioners to declare the ballots they had previously mailed to members null and void, and long before the electoral processes proposed by the union were commenced, the District Court issued a memorandum decision (Pet. App. A at 1-40) and a preliminary injunction (Pet. App. B at 86-93). In its memorandum decision the Court found the Respondents to have shown a substantial

4. The District Court was prepared to allow Joint Council 10 or some other entity affiliated with the union supervise the election (Jt. App. at 104-105), but said entities refused to do so. Only after said refusal did the Court appoint a third party and then only after Mr. Witlen, counsel for Petitioners, represented to the Court:

> "The local union is willing to bring in a third party." and "We are not going to have any objection to any person that is designated to run the election." (Jt. App. at 104 and 112).

likelihood of prevailing on the merits of their claims that the Petitioners had violated their rights under Title I. The preliminary injunction provided for an election to be conducted within 80 days and supervised by third parties to whom the Petitioners had specifically noted they did not object. The order also enjoined the two principal officers of the union, Petitioners Griffiths and Harris, from violating specified rights of any member of Local 82 (Pet. App. B at 92). The Petitioners objected at that time only to the Court's findings of fact and enjoining future violations of Respondents' Title I rights,5/ and to the fact that the Court

5. Both the record and Petitioners' arguments to this Court reveal that they do not now and never truly have asserted any bases for challenging the jurisdiction of the District Court to have entertained Respondents' Title I claims and granted some form of relief on them: in particular the order enjoining future violations of Respondents' Title I rights. At most Petitioners object now and then objected only to some of the form of relief requested and afforded on Respondents' Complaint.

ordered the election to be conducted pursuant to and subject to a Court order. It is solely from the last part of this order that Petitioners seek relief from this Court.

The Petitioners filed an appeal in the Court of Appeals for the First Circuit and sought a stay of the election, which was denied. The election was conducted thereafter in accordance with the Court's order without incident or protest by any member. The officers elected at that time are presently serving out the end of their terms of office, which expire in January of 1984.

On May 21, 1982 the First Circuit Court of Appeals affirmed the decision of the District Court. In doing so the Court

held that relief for violations of electoral rights protected under Title I was not preempted by Title IV of the LMRDA (Pet. App. B at 54), that Title I provided jurisdiction for the District Court to grant the relief it afforded Respondents (Pet. App. B at 58), and that the instant case did not concern "an election already conducted." (Pet. App. A at 67).

INTRODUCTION AND SUMMARY OF ARGUMENT

Ordinarily both the issues briefed and issues in actual controversy, and the relief sought and relief available would be the same, and no introductory statement distinguishing the two would be required of a respondent; the present case is far from ordinary in this respect. The arguments presented in the briefs of the Petitioner union and union officials, the Federal Respondent Secretary of Labor, and Amicus

Curiae AFL-CIO to which Respondents must reply have been considerably obfuscated and confused by these parties' having ignored significant many aspects of the proceedings in this case. The most significant of these was, as noted in the opinion of the Court of Appeals, that:

> The district court constructed a preliminary injunction that effected as little change as possible from terms which Defendants found acceptable... [M]any of the provisions of the injunction were included at the request of or with the agreement of the defendants, the objecting party here. Indeed, defendants appear to object specifically - we address elsewhere their general objection to any court-ordered election - only to two paragraphs of the injunction... They otherwise agree to the terms of the injunction.
> (Pet. App. B at 74).

The "court-ordered" election to which the Court alluded was the one which Petitioners in fact stipulated to conduct.

Despite these uncontestable facts, each of opposing parties' briefs proceeds as if

the entirety of the order of the District Court was imposed on Petitioners, objected to by them, and thus properly the subject of issues presented on the instant writ of certiorari. As a result they have collectively promulgated and discussed questions for review in support of requests for relief that are wholly out of place and that have not, since long before the issuance of the order of the District Court, been in controversy in the instant proceedings.

For this reason, it is crucial at the outset to set out precisely what this case does and does not concern. This case properly concerns the propriety of the District Court's having overseen the running of an election conducted in the wake of the Court's finding that violations of Title I of the LMRDA had occurred prior to the commencement of balloting in earlier

electoral proceedings, which the union subsequently declared null and void. It does not concern the propriety of the District Court's having enjoined an election from proceeding and/or ordered an election to be rerun. It does not concern the entry of orders affecting the conduct of "an election already conducted." And it does not concern the Court's having named third parties from outside the structure of an international union rather than parties from within it to supervise the conduct of an election.

Hence the Respondents first contend in Section IA, infra, that the chief issue, if not all the issues, Petitioners have raised by their petition on the instant writ fail to meet this Court's jurisdictional limitation to entertaining only actual cases or controversies and/or are so insignificant as to warrant a determination

that certiorari was improvidently granted.

In a similar vein, although Petitioners ask in their brief to this Court that "the Complaint be dismissed, the injunction issued dissolved, and the ballots cast in the December 13, 1980 election released to the Local Union" (presumably to be counted, following which the union would install the officers elected thereby into office), they have not asserted a single reason why this Court could or should afford such relief. This Court could only permit dismissal of the Complaint below if Petitioners were able to demonstrate that Respondents' Complaint failed to allege any claim cognizable under Title I. Yet the Petitioners have never even advanced such a contention, either before the Court of Appeals, or in this this Court. Short of that, this Court could only permit dissolution of the entirety of the

injunction below if it found both that the findings of the District Court were wholly erroneous,6/ and further that there were sound reasons disregarded by the District Court for releasing Petitioners from the stipulations they proferred to Court.7/

All that logically remains after such an analysis of relief Petitioners could possibly seek on the issues they have presented to this Court are only the following five requests:

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6. These findings were affirmed by the Court of Appeals and not made a part of the subject matter of the Petition to this Court.

7. As indicated in note 2, supra Petitioners did not request that relief of the District Court when the Judge therein inquired if that was what they desired. This issue was not appealed to the Court of Appeals or made a part of the subject matter of the Petition to this Court.

(1) to release and permit them to count the ballots from the 1980 election, despite the fact that Petitioners' stipulations have rendered these ballots devoid of any electoral significance; and/or

(2) to void the results of the 1981 election conducted under the Court's supervision and permit an unsupervised election to take place.

For this reason Respondents contend in Section IB, infra, that an examination of the relief this Court could afford to Petitioners reveals yet another reason why the instant writ should be dismissed as moot.8/

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8. Respondents wish to note two additional points about these arguments.

In the first place when Respondents raised one of these two claims of the absence of a controversy to this Court by motion, which this Court denied without prejudice prior to receiving Respondents' clarification of their motion, Petitioners replied that Respondents were erroneously contending that Petitioners had waived and could have waived a jurisdictional defect by stipulation. This was not and is not

In Section IIA, *infra* Respondents assert that the First Circuit Court of Appeals correctly determined that the relief afforded to them by the District Court was appropriate under Title I of the LMRDA in light of the legislative history of the Act, the nature of the violations found by the District Court, and appropriate policy considerations.

In Section IIB, *infra* Respondents assert in the alternative that the same history and similar policy considerations support the conclusion of the Court of

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the case. Respondents' assertion was and is that Petitioners cannot now object to orders which did little more than incorporate their own binding stipulations: i.e., Petitioners cannot base a claim of a jurisdictional defect, if any ever existed, that they voluntarily caused to cease to exist in fact and law.

In the second place it is not Respondents' contention that the entirety of the action they brought in the District Court is moot or will become moot for these reasons. Many issues raised in that action, which have not been appealed to this Court, remain very much alive and some remain which the District Court may yet have to adjudicate.

Appeals that the election of the Petitioner union had not been "already conducted" when the District Court afforded Respondents the relief and for that reason also the relief afforded by the Court was appropriate under Title I of the Act.

ARGUMENT

I. THE COURT SHOULD DISMISS THE INSTANT WRIT IN WHOLE OR IN CHIEF AS MOOT

A. THE ISSUES PRESENTED CHALLENGE ONLY ORDERS OF THE DISTRICT COURT TO WHICH PETITIONERS LARGELY STIPULATED OR ASSENTED, AND THEREFORE FAIL TO PRESENT A LIVE CONTROVERSY OVER WHICH THIS COURT CAN PROPERLY EXERCISE ITS JURISDICTION

The Federal Courts are without power to decide questions that are no longer live cases and controversies. North Carolina v. Rice, 404 U.S. 244, 246 (1971). "The inability of the federal judiciary to

review moot cases derives from Art. III of the Constitution." Defunis v. Odegaard, 416 U.S. 312, 316 (1974), citing Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964), Powell v. McCormack, 395 U.S. 486, 496 n.7 (1969), and Sibron v. New York, 392 U.S. 40, 50 n.8 (1968). The question of mootness is one which a federal court must decide before assuming jurisdiction or, having done so, before reaching the merits of a matter before it. North Carolina v. Rice, supra, at 246; Roe v. Wade, 410 U.S. 113, 125 (1973); SEC v. Medical Committee for Human Rights, 404 U.S. 403 (1972).

If any party's principal claim in an action has become moot, the Court may nonetheless retain jurisdiction over the case, but only to decide any unsettled claims or issues that may remain. Kremens v. Bartley, 431 U.S. 119, 129-130 (1977); United Public Workers v. Mitchell, 330 U.S.

75, 86-94 (1947); Powell v. McCormack, supra, 497-499 (1969), citing 6A J. Moore, Federal Practice s.57.13 (2d ed. 1966).9/ See also Muskrat v. U.S., 219 U.S. 346 (1911).

There is no case or controversy once the matter has been resolved whether by stipulations, assents or other voluntary action by the party seeking review which has rendered issues moot, Wright, Federal

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9. Professor Moore summarizes the rulings of this Court on the above question and the question of when intervening events or the passage of time render a matter moot. He says:

> One or more of the issues involved in an action may become moot prior to or during the trial of the action in the lower court. In this event the trial court should refuse to make an adjudication of the moot issue(s). If the non-mooted issues that remain are sufficient so that the action itself remains justiciable then the trial court properly proceeds to adjudicate those issues... similar principles apply where one or more of the issues become moot pending appeal or pending the decision of the appellate court... In the event the mooted issues are controlling, the appellate court should refuse to review the merits.
>
> 6 Moore's Federal Practice, Section 57, at 121-132 (2d. ed. 1966) (citations omitted).

Courts at 33 (1963). See Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498 (1911); and U.S. v. Anchor Coal Co., 279 U.S. 812 (1929). Those issues are no longer capable of being revi ewed. Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 334-40 (1980); Princeton Univ. v. Schmidt, U.S. , 102 S.Ct. 867 (1982).

It was the Petitioners' stipulation below, not the actions of the District Court, which caused the ballots to become null and void, and caused the election they now contend the District Court ordered them to conduct to be conducted.10/ Virtually

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10. This aspect of the mootness of the instant appeal fails to meet either of the tests of the "capable of repetition" doctrine discussed in Section IB, infra. For one thing these issues became moot not by fleeting passage of time, but by the voluntary action of the party who now seeks to have them reviewed. Furthermore they are, as will also be discussed in greater detail in said argument, highly unlikely to arise again between the same parties in the future.

the same results would have occurred as the direct consequence of Petitioners' stipulations had the Court below never entered any order but one dissolving that aspect of its temporary restraining order that prevented Petitioners from taking such steps as they proposed to take in their stipulations on their own. Where a party has accepted the security of a change of position or compromise, it cannot subsequently contend that it may appeal issues it compromised or settled out of the litigation. Donovan v. Penn Shipping Co., 429 U.S. 648 (1977); Marvirazon Compania Naviera, 674 F.2d 364 (5th Cir. 1982). There is no reason to treat any differently a party that has offered a voluntary, binding stipulation to serve its own intended purposes.

The present case does not as well raise any issue as to whether Section 403

of the Act preempts a Court from granting Title I relief with reference to "an election already conducted", for which relief is available under Title IV of the Act. The orders issued by the District Court came several months subsequent to the date on which the Petitioners' stipulations voided the ballots the union had sent out. At that point in time every conceivable aspect of the election to be conducted remained to be conducted; and the earlier election was in all respects voided ab intitio. The Petitioners offered their stipulations and the District Court accepted them with full understanding that they were proferred "to alter the context in which the Court (was) being asked for preliminary relief." (Jt. App. at 99) 11/

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11. See note 2, supra.

Having openly offered them for precisely this purpose, Petitioners can hardly now seek to challenge the subsequent action of the Court on the contention that the offer of the stipulations in no way affected that "context."

The same conclusion is manifest and inescapable when one considers the appointment of third parties to conduct the 1981 election in the union.12/

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12. As noted heretofore it was the Petitioners' own actions that resulted in the District Court's appointment of third parties not affiliated with the union tc supervise the new election. Although they initially stated that Teamsters Joint Council 10 was willing to conduct the new election (Jt. App. 104-105), the Petitioners subsequently informed the Court that Joint Council 10 refused to do so if it had to be accountable to the Court (Jt. App. 107-108). Though the Court several times asked the parties to suggest a suitable third party (Jt. App. 107, 111), the Petitioners never made any other suggestions or recommendations about possible third parties. As a result the Court had no choice but to appoint a third party of its own selection from outside the international union structure of Petitioners to conduct the election.

What remains at most in the case before this Court then is a writ issued on a petition challenging the District Court's determination, after having found that substantial Title I violations had been committed by the Petitioner union officers, that it would oversee the electoral process the union had stipulated it would conduct in 1981 rather than let the offending officers conduct it unsupervised. To the extent this issue remains, as is discussed in Section IIB, infra, it does so only in the context of relief granted under Title I prior to the time electoral processes have commenced, and is not open to challenge under the provisions of Section 403 of the Act.

B. EVEN BEFORE THE NEXT REGULARLY MANDATED ELECTION OF THE PETITIONER UNION OCCURS, THERE WILL NO LONGER BE ANY REASONABLE LIKELIHOOD EITHER THAT THE COURT WILL BE ABLE TO AFFORD THE PETITIONERS ANY RELIEF HEREON OR THAT THE SAME CONTROVERSY WILL ARISE BETWEEN THE SAME PARTIES IN THE FUTURE

Even assuming that the District Court ordered what Petitioners contend it did, to the extent that order is challenged herein, it is or soon will become moot in a second respect. The order is presently only "live" because the officers elected pursuant to them are now serving out the end of their term of office. Once they have left office, even the minimally important relief that Petitioners could request herein will be beyond the power of this Court to grant.13/ This is because by

13. Petitioners are required by both LMRDA and its own Constitution and By-Laws to conduct a new election of officers in November and December of this year, and install them in office in January of 1984.

mandate of 29 USC 481(b) and the Constitution of the Petitioner Local Union the next regularly-scheduled election in this local union and installation of new officers will have to occur before this Court will rule upon the issues presented by this petition,14/ as the Secretary of Labor concedes (Brief for Federal Respondents, n.21 at 45).

A ruling by this Court would have to come long before the January, 1984 installation date of new officers to affect the rights of the parties, if this Court deems that the District Court should have permitted an unsupervised election to take place as Petitioners' stipulations proposed. This is because the election processes themselves would take several months time before new officers could be nominated, elected and installed. Hence the Court would have to issue such a ruling on or before the date oral arguments are tentatively scheduled to be held in this case. Likewise, once the 1983 electoral process has been commenced, none of the relief Petitioners can or do seek by its appeal can be affected by this Court. Hence this action will, if it is not already, become entirely moot before this Court can fully adjudicate any of the issues pending before it.

While it is true that in a limited number of circumstances issues or actions that have become moot may thereafter be reviewed, they may only be so reviewed when they meet the following two stringent requirements:

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14. The Secretary argues that this action will not be moot by the time the Court hears it because the intervention of an election does not cut off the Secretary's right under Title IV to exercise his statutory authority with regard to a preceding election. This argument is wholly inapplicable to the instant circumstances. In the first place the decision in Wirtz v. Glass Bottle Blowers Association, 389 U.S. 463 (1968), cited by the Secretary, is not on point because this is neither a Title IV case, nor one where the Secretary has exercised or could at this late date exercise any statutory authority. Additionally, Respondents note that they do not contend the case below will become entirely moot once an election takes place, but rather contend only that he orders which are the sole subject of the instant petition will have become moot once such an election transpires and unsusceptible to remedy by this Court even before that date. Hence even if the logic of the decision in Wirtz cited by the Secretary, applied to the instant case, it would not have any relevance to the questions presently raised by this appeal and the request that it be dismissed as moot.

> "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and
>
> (2) there was a reasonable likelihood that the same complaining party would be subjected to the same action again." (emphasis added)
>
> Weinstein v. Bradford, 423 U.S. 147, 149 (1975); Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 187 (1979); SEC v. Sloan, 436 U.S. 103, 109 (1978); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 774 (1978). See generally Sosna v. Iowa, 419 U.S. 393, 399-401 (1975).

Thus, based on this narrow exception to the doctrine of mootness, the Petitioners can only avoid dismissal of this writ if they are able to demonstrate that these parties are likely in the future to end up in the same situation again.

> "It is not enough that a federal court may again be called upon to decide the legal issue raised in this litigation. Rather, there must be a reasonable degree of likelihood that this issue will be the basis of a continuing controversy between these two parties. Central Soya Co. Inc. v. Consolidated Rail Corp., 614 F2d 684, 689 (7th Cir. 1980)."

In this case the two Petitioner officers found to have violated the Respondents' rights and the Local are under an outstanding order, not the basis of this appeal or otherwise contested, to refrain from violating those rights in the future. Given the fact that some of the Respondents are no longer in the union and one of the two Petitioner officers no longer in office, and an order, the validity of which is not challenged, is outstanding which prohibits the Petitioners from repeating such illegal actions, there is virtually no chance of a recurrence of the complained of conduct and hence another order enjoining a future election issuing on said account. See Central Soya Co., supra at 689. See also Alyeska Pipeline Service Co. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 959, 535 F.2d 66 (9th Cir. 1976).

> Speculative contingencies afford no basis for [our] passing on [the] substantive issues [the petitioner] would have [us] [the Court] decide[d], Hall v. Beals, 396 U.S. 45, 49 (1969), in the absence of evidence that there is a prospect of immediacy and reality. Golden v. Zwickler, 394 U.S. 103, 109 (1969); Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941). DeFunis v. Odegaard, supra at 320, n.5. See also City of Los Angeles v. Lyons, U.S. , 103 S.Ct. 1660 (1983).

Similarly the mere possibility that the Court below might issue further orders in the future is too speculative to provide a basis for review of the soon to be mooted orders of the Court below.15/

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15. The Secretary also argues that this action is not moot because the District Court could at sometime in the future conceivably issue an order about future actions of the local and its officers. This reason too fails to justify this Court's reviewing the instant case. The fact that the Court below might issue other orders in the future in this case has no bearing on the question presented by the instant appeal and Respondents' request that it be dismissed. If the District Court does issue such an order, review would only be appropriate after its issuance.

Hence in Canez v. Guerrero, 707 F.2d 443 (9th Cir. 1983), a case nearly identical in most respects to the instant case, the Ninth Circuit Court of Appeals recently decided that an appeal to it from orders concerning a union election was moot for the very reasons Respondents herein urge the instant one is moot.

II. THE PRELIMINARY INJUNCTION ISSUED BY THE DISTRICT COURT WAS WITHIN THE SCOPE OF ITS AUTHORITY

A. SECTION 403 OF THE LMRDA DOES NOT BAR A COURT'S GRANTING INJUNCTIVE RELIEF AFFECTING THE CONDUCT OF AN ELECTION WHEN TITLE I OF THE ACT HAS BEEN VIOLATED

(1) The Legislative History Of The LMRDA Demonstrates That Congress Adopted Title I To Provide Additional Rights Protecting Democratic Activity Of Individuals And Groups Of Union Members In Elections, And Intended That Those Rights Be Enforced Privately And By Injunctions.

The legislative history of Titles I and IV do not demonstrate, as Petitioners,

the Secretary and the AFL-CIO contend, a clear Congressional intent to vest in the Secretary the sole authority to afford any relief affecting the processes by which elections are conducted, to restrict Title I relief concerning election violations to suits for damages, or to restrict Title I by providing only damages as relief for violations thereof. Nor does the Congressional history evidence so great a desire to preserve the autonomy of union internal functionings as these parties' briefs contend. Rather, Congress' intent on these issues is at best ambiguous or unstated on some of these questions,16/ and

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16. "The legislative history of the LMRDA does not conclusively explicate the intended relationship of Titles I and IV, because Congress never seriously considered the interplay question: indeed, Congress was barely aware of its existence. Although both titles were products of the McClellan hearings of 1958, the provisions that now comprise Title IV were drafted, debated and approved by the Senate before Title I was introduced. Congress's

quite contrary to what these parties assert on others. This is reflected, as the First Circuit Court of Appeals and many others have noted, in the Congressional debates, the resultant language of the Act, and an analysis of that language in the context of the goals expressed by Congress in the "Declarations of Findings, Purposes and Policy" preceding the substantive provisions of the LMRDA (hereinafter referred to as Congressional policy statement) 29 U.S.C. 401.

Two critical points about the analysis of Congressional intent proffered by

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intention that suit by the Secretary of Labor be the exclusive post-election remedy under Title IV cannot, therefore, be extended to Title I suits in the absence of specific provision for such an extension. Only affirmative evidence from the legislative history of Title I could require that extension. Affirmative evidence would also be required to justify subsuming Title I's enforcement procedures under those of Title IV in the pre-election overlap cases." Note; "Union Elections and the LMRDA: Thirteen Years of Use and Abuse," 81 Yale L. J. 407 (1972) at (emphasis added). See also Harris, "Titles I and IV of the LMRDA: A Resolution of the Conflict of Remedies," 42 U.Chi. L. Rev. 166 (1974) at 177.

Petitioners and their supporters need to be made at the outset of this discussion. In the first place the briefs of the Petitioners and their supporters overlook the forest for the trees in describing what Congress' intent was even, as to Title IV of the Act standing alone. As the Court of Appeals also noted and considered (Pet. App. B at 51), these parties' brief correctly point out that Congress, in passing Title IV, was "guided by the general principles that unions should be left free to 'operate their own affairs, as far as possible.'" Steelworkers v. Sadlowski, U.S. __ ,102 S.Ct. 2339, 2348 (1982). However, that principle was not the only one or the overriding one guiding Congess in enacting Title IV. The primary purpose of Congress in enacting Title IV and the LMRDA as a whole was to curb the types of abuses enumerated in the

Congressional policy statement 29 U.S.C. 401, and guarantee that officials of labor organizations "adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations." 29 U.S.C. 401(a). The type of abuses Congress sought in particular to correct were "breach of trust, corruption, (and) disregard of the rights of individual employees."17/ 29 U.S.C. 401(b)

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17. "The Select Committee on Improper Activities in the Labor or Management Field (the McClellan Committee) extensively investigated the abuses of union leaders and the relation of organized crime to organized labor, ultimately finding 'a significant lack of democratic procedures in the unions studied.'" (footnotes omitted) 42 U. of Chi. L. Rev. at 176. See also note 19, infra and Estreicher, "Pre-Election Remedies Under the Landrum-Griffin Act: The 'Twilight Zone' Between Election Rights Under Title I and V", (hereinafter "Twilight Zone"), 74 Col. L.Rev. 1105.

It is difficult at best to reconcile the conclusions regarding Congress' intent reached by Petitioners and their supporters with these expressed Congressional goals. But virtually ignoring these goals is only the first of several shortcomings of these parties' analyses of the history and intent of Congress in enacting Titles I and IV of the Act.

The second shortcoming of these parties' analyses arises from their lumping together the two steps of the process that lead to the enactment of Titles I and IV, and correspondingly assuming that Congress' purposes regarding Title IV should and could be automatically transferred intact to explain Congress' intent in adopting Title I. Given the very different character of rights protected under Titles I and IV, and the different means Congress elected to enforce them, there is no sound

basis for presuming that such a wholesale transfer is appropriate.18/

Title IV of the Act deliberately made its way through Congressional committees over the course of several years; Title I was put together in two steps over the course of a few days on the floor of Congress. The history of the Senate Committee which reported out S. 1555, the bill that went to the Senate floor containing provisions similar to the present Title I, is chiefly helpful in interpreting Title IV of the Act (Pet. App. B at 56). The keystone for interpreting Title I is the fact that, on seeing Title

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18. "Although Title I was introduced in response to the inadequacies of the Title IV measure, Congress gave little express consideration to the interrelationship of Titles I and IV. It should not be assumed from the silence of the legislative history on this point, however, that legislators who were determined to transplant constitutional guarantees into the internal union arena, despite the intensive lobbying efforts of organized labor, intended to render Title I nugatory with respect to all election-related practices." "Twilight Zone," 74 Col. L. Rev. at 1125 (footnotes omitted).

IV as reported out of Committee and ultimately adopted by Congress, "Senator McClellan and other legislators feared that the bill did not go far enough because it did not provide general protection to union members who spoke out against the union leadership." Steelworkers v. Sadlowski, 102 S.Ct. at 2344 (emphasis added).

That Congress intended to remedy this problem by enactment of Title I and that it intended that the rights protected thereunder extend to union elections as well as in other union processes is a fact the Secretary and this Court have long heretofore recognized. Hence in Wirtz v. Hotel Employees Union, 391 U.S. 492, 497-8 (1968) this Court stated:

> A pervasive theme in the Congressional debates about the election provisions... is made explicit in the reports of the Labor Committees of both Houses of Congress. It is reflected in the discrete provisions of Title IV and also of Title I, the 'Bill of Rights' for union members. (emphasis added).

Hence too the Secretary's regulations concerning union elections state that Title I rights apply to electoral processes of unions. 29 CFR 452.7 And finally for the same reason this Court recently pronounced:

> Congress recognized that democracy would be assured only if union members are free to discuss union policies and criticize the leadership without fear of reprisal. Congress also recognized that this freedom is particularly critical, and deserves vigorous protection, in the context of election campaigns. For it is in election campaigns that members can wield their power, and directly express their approval or disapproval of the union leadership.
> Steelworkers v. Sadlowski, supra, 102 S.Ct. at 2346 (emphasis added).

In seeking to protect these rights - in particular the rights of union dissidents and minorities - which Congress recognized the other titles of the Act did not do, Congress provided in Title I for the protection of the most fundamental of democratic rights - the right to be free from discriminatory treatment in

nomination, election, referendum and other decision-making processes of union (Section 101(a)(1)), the right of free speech and assembly (Section 101(a)(2)), the right to sue (Section 101(a)(4)) and the right to have certain procedural due process protections in disciplinary proceedings (Section 101(a)(5)). Congress consciously made these guarantees specifically applicable to the very electoral processes it also regulated under Title IV of the Act.

There is no support in the language of the Act or the history of Title I for the proposition that Congress intended to have Title I rights enforced in the same fashion as Title IV rights, or else not enforced at all.19/ Indeed, that Congress did not have

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19. "Neither the floor debates not the Senate and House reports indicate a Congressional intention to subsume the Title I enforcement procedures under those of Title IV in overlap cases." "Remedies," 42 U. Chi. L. Rev. at 178-9 (emphasis added)

precisely the same goals in enacting Titles I and IV, and did not intend for Title IV's enforcement processes to swallow up Title I election rights is evident from both the specific provisions of Title I and the history of its adoption. The nature of the rights protected by Title I and the mechanism for enforcing them respectively were and needed to be different from the nature and mechanism for enforcement of Title IV rights was explicitly recognized by Congress. The Senate, after adopting an amendment providing for enforcement of Title I rights by the Secretary, by a vote

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"Total preemption of Title I relief by Title IV in the area of elections is belied by the legislative history of the LMRDA... Congress added Title I at least partly in response to fears that Title IV was not strong enough to effectuate the central purpose of the LMRDA, the preservation of union democracy. Calhoon v. Harvey, 379 U.S. 134 (1964) (J. Stewart, concurring at 146) (citations omitted).
See also Kupau v. Yamamoto, 622 F.2d 449, 455 (9th Cir. 1980).

of 47 to 46, immediately and specifically thereafter adopted an amendment, taking this enforcement mechanism out of the hands of the Secretary by an overwhelming vote for very deliberate reasons. A. Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 832-3 (1960). The House adopted the change for particular though different reasons, which were also consciously considered and, as discussed hereinafter, are germane to the issues presently before the Court.20/

The Congressional record is also clear that, even before amending Title I to provide for private enforcement, Congress contemplated that the mechanism for

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20. The House was concerned with the vast increase in scope of the Secretary's operations that might result under Title I and resulting vast increase in budgetary needs for the Labor Department (See remarks of Cong. Teller, 105 Cong. Rec. 15681-82 (1959)).

enforcing Title I rights would be different from that provided in Title IV. Hence injunctive relief and damages were both always contemplated and included as remedies under Title I, though neither was a specified remedy in Title IV.21/ So too the remedies in Title I, being intended to protect the most fundamental of democratic rights, were not subjected to the limitations imposed in Section 402(c)(2), which provides that violations of Title IV shall be redressed only if they "may have affected the outcome of an election." 29 U.S.C. 482(c)(2).

In a similar vein Congress did not show the same deference to intra-union dispute resolution processes in Title I that it showed in Title IV. The different

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21. When Title I was first added to the Act it provided for enforcement of rights thereunder by the Secretary of Labor. Even then enforcement was not through the procedures of Title IV, but by an action for appropriate relief including injunctions (105 Cong. Rec. 6476 (1959)).

exhaustion requirements of Sections 101(a)(4) and 402(a)(1) and (2) underscore the differing degrees of deference to union autonomy Congress determined were appropriate considering the difference between the nature of the rights protected under the separate titles. While Title IV insures some union autonomy by making three months of exhaustion a prerequisite to governmental remedial action with reference to more technical violations of electoral rules and generally unfair restrictions applied uniformly to all members, there is little indication that Congress thought that union officials who have discriminated against or deprived their members of their most fundamental rights would or could necessarily correct such abuses internally.22/ Indeed, the extensive

history of abuses of power uncovered by the investigations of the McClellan Committee suggested that the contrary, if anything, was anticipated: i.e., that the rights protected by Title I, being in their nature more generally-phrased protections against discriminatory treatment by union officials, are inherently less likely to be subject to correction by the very persons who engaged in the wrong than are the rights protected by Title IV.

It is not surprising that Petitioners,23/ the International

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22. "The Congressional solicitude for union self-regulation and wariness of judicial intervention evidenced in Title IV are not characteristic, however, of the other titles of the Act. In particular, Title I and Title V, both susceptible of application in the election context, are enforceable by direct member suit without mediation by the Secretary". "Twilight Zone," 74 Col. L. Rev. at 1107-8. (footnotes omitted).

23. The local union and its chief officer herein have been found guilty of precisely the kind of abuses of power Congress sought to eliminate - not minimally regulate - when it passed Title I.

Brotherhood of Teamsters,24/ and the AFL-CIO 25/ view the provisions of the Act they vigorously opposed and its legislative history in the fashion they do. Nor is it surprising 26/ that the Secretary of Labor, whose budget and role was severely restricted by the Kuchel Amendment and

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24. Petitioners' International, by whose legal counsel the local and its officers are represented herein, is one with a long as well as recent history of abuses of the LMRDA and other acts of Congress.

25. As noted in Calhoon, supra (J. Stewart, concurring at 144), organized labor opposed passage of the LMRDA.

26. "In every major court case involving the right of complainants to seek direct recourse in court to assert the LMRDA rights, the DOL has favored restrictions on that right." H. Benson, "Union Democracy and the Landrum-Griffin Act", Vol. 11, No. 1 N.Y.U. Review of Law and Social Change 153 (1982-83), citing 81 Yale L.J. 409, Calhoon, supra, Trbovich v. United Mine Workers, 404 U.S. 528 (1972), Dunlop v. Bachowski, 421 U.S. 560 (1975), Brennan v. United Steelworkers of America 554 F.2d 586 (3rd Cir. 1977), cert. den. 435 U.S. 977 (1978). (footnotes omitted)

whose performance in enforcement of Title IV of the Act is less than praiseworthy,27/ concurs in their view of this Act and its history. However, the fallacy of their views, which in essence argue for a total rewriting of Title I, are as evident as their subjectivity.

Two of the reasons Bensen notes for this phenomenon are:

> The desire of the Secretary of Labor to remain on the good side of union leaders may be political: unions may help to reelect the President under whom the Secretary serves. This motivation on the part of the Secretary plays a significant role in shaping Department of Labor policies. An added complication is that, among secretaries identified with unions, some are actually former union officials.
> "Union Democracy," 11-1 N.Y.U. L.S.C. at 162 (footnotes omitted).

27. The numerous instances demonstrating the proposition that "the Labor Department [has a] poor record in enforcing the LMRDA" as well as the reasons for that poor record are discussed in some depth by Herman Bensen in his previously cited commentary. See note 26, supra. Bensen notes that the Department's record reveals that:

> (a) the Secretary of Labor may often "cozy up" to union leaders, placing a heavy burden on opposition candidates who file

complaints to prove they could have won an election against the incumbents (at p. 159);

(b) the Department of Labor has slanted decisions in favor of incumbents (at p. 160, citing "How the U.S. Labor Department Whitewashed Election Fraud Despite Federal Judge and New York Grand Jury", Union Democracy in Action, Feb. 1968 at 1. Schonfeld v. Wirtz, 258 F. Supp. 705 (S.D.N.Y. 1966); Schonfeld v. Raftery, 271 F.Supp. 128 (S.D.N.Y. 1967), aff'd, 381 F. 2d 446 (2d Cir. 1967); and

(c) recommendations for Court actions to overturn illegal elections made by regional compliance officers (career employers) are regularly vetoed by political appointees in the D.O.L. Washington headquarters at rates estimated to be as low as ten percent in some areas and as high as sixty-five percent in others (at p. 163, citing D. McLaughlin & Schoomaker, "The Landrum-Griffin Act and Union Democracy" (1979)).

Bensen contends that this record "demonstrates [the Department's] reluctance to perform what it views as an unwelcome task. Part of the reason for this reluctance is that the Department's responsibility to enforce the Act runs counter to its principal function. Generally, the Labor Department's responsibility is to serve labor, much as the Department of Commerce is supposed to serve business." He further notes, "In order to avoid strikes and foster friendly relations between unions and management, the Department tries to maintain cooperative and amicable relations with labor leaders... It is paradoxical that the Department which is compelled to maintain close ties with union leaders is also expected to adopt an adversarial position toward them in enforcing the LMRDA enforcement agency." "Union Democracy," 11-1 NYU L.S.C. at 162-3.

Petitioners, the Secretary and the AFL-CIO urge the Court to find that Congress intended that the federal courts disregard all Title I violations affecting the processes by which elections take place, except for those raised by the Secretary in Title IV proceedings and except for awarding damages to the victims of such violations who bring suit under Title I.28/ Not one of their Briefs cites a single Congressional statement to such an effect; rather they infer such an intent through a two-part "logical" process.29/

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28. Brief for Federal Respondent, n. 20 at 44; and Brief for AFL-CIO, n. 3 at 6. It is somewhat ironic that the AFL-CIO takes this posture since it also extensively argues that Title I relief should be limited by traditional principles of equity (Brief for AFL-CIO at 16-21).

29. They also argue that policy considerations support this proposition. These are discussed in the Section IIB(2) infra.

First they disregard all the statements of Congressmen, the language in the Act, commentators' views and pronouncements of courts discussed above. They justify disregarding all the evidence contrary to their position in the language of the Act by attributing the existence of that language to oversight on the part of Congress. They argue the oversight occurred due to "haste", "no discussion", "work... done late at night", "a flurry of activity", "copies of it... [not being] available to members of the Senate until the next day, when it passed," and "parliamentary law [rendering] the conferees... powerless to revise" its provisions. Brief for Federal Respondent at 13-21.

The second part of the process by which they reach this conclusion is by inferring it from two statements contained

in Title IV of the Act: the first being the language of Section 403 providing that the remedy thereunder is "exclusive" for challenging "an election already conducted"; the latter being the proviso of Section 402(a) for presuming the challenged election valid pending Court action.

In response to the first of these points - oversight on the part of Congress - Respondents simply say that the suggestion of oversight and error on the part of Congress is belied by the fact that Congress could not have so wholly overlooked either the words regarding elections and remedies in Title I, or their evident meanings. Furthermore it is belied by the numerous expressions, noted heretofore, of members of Congress that Title I was needed because sufficient protection for dissidents, such as Respondents, was not provided in the context of elections under Title IV.30/

As to the first part of their second point - that Title IV is the exclusive remedy for challenging an election already conducted - Respondents note that the Congressional record is quite clear that the "exclusive remedy" language of Section 403 was directed not at Title I rights, but at the panoply of diverse state laws governing union elections. The intent of Section 403 was to bar "state regulation of union elections... in the interest of uniformity" for the several reasons noted by Professor Cox in his aforecited article. "Internal Affairs", 58 Mich. L. Rev. at 846. Hence the First Circuit correctly found little or no support for these parties' arguments to the effect that this language of Section 403 was directed to or applicable to the enforcement of rights under Title I. Rather the Court concluded

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30. See note 19, supra.

correctly, as this Court also noted in Trbovich v. United Mine Workers of America, 404 U.S. 528 (1972), that:

> The debates reflect great concern with the proper relationship between state and federal remedies, and much less concern with the relationship between private and public enforcement.
> 404 U.S. at 534, n. 6

Furthermore, an examination of the reasons underlying the adoption of the "exclusivity" rule of Section 403 suggest no basis for concluding that Congress intended that the same rule should be applied to Title I violations. Indeed the reasons set forth in Professor Cox's article belie the Petitioners', Secretary's and AFL-CIO's suggestions that the reason for the adoption of this bar was to give the Secretary, rather than the Courts, control over all aspects of union election violations. This position too is irreconciliable with the uncontestable facts that Congress intended to provide and

did in fact provide for protection of certain electoral rights in Title I; and consciously voted by an overwhelming majority to revoke the provision originally therein for the Secretary to enforce these I rights.

As to the latter part of their second point - that an election is presumed valid - Respondents again note that there is nothing in the Congressional record to suggest that Congress intended that officials who violated Title I of the Act be installed in the offices they stole for several years pending the processes provided for under Title IV.

Additionally there is no inherent inconsistency between the provisions of either of these Titles and the granting of injunctive relief under Title I. Quite to the contrary, there are three very sound

reasons for concluding that Congress did not necessarily intend that the status quo provided in Title IV while Title IV violations are being litigated be applied under Title I where violations thereof are being litigated.

The first of these three reasons is simply that Congress provided for that status quo explicitly in Title IV and did not do so in Title I or make it applicable to existing state law remedies.

The second of these reasons reflects the differing nature of rights protected under Titles I and IV. Where union officers are newly elected as a consequence of their intentional discrimination against some of their membership, there is considerably less justification for installing them in office than where their election may have occurred because of a violation of some more technical

requirement of Title IV of the Act. There is nothing in the Congressional history to suggest that, when the fundamental rights protected by Title I are violated, Congress intended to have the perpetrators installed in office and allowed to reap the fruits of their misdeeds for the better part of the term of office they may have stolen. The instant case provides a good example of why Congress might have felt that injunctive relief might be necessary: the Petitioner officers first unlawfully locked their most ardent critic out of the nominations meeting and then insured that Petitioner Griffiths ran unopposed by failing to properly record the nomination of one of the Respondents to oppose him (Pet. App. A at 21).

Additionally the different processes provided under the two titles also explain why Congress would have provided for

judicial discretion on this point under Title I and a clear rule on it under Title IV, just as it did with internal union "exhaustion" requirements discussed above. The process for remedying violations of Title IV is slow by its very nature. Before a court can conclude that a violation has occurred, a process of at least four months time must transpire before an action is filed before it; and not until long thereafter does a trial on the merits of that action take place. Such a process will by definition take at least six months and up to several years before issuance of a decision on its merits. On the other hand, Title I specifically provides for direct appeal to the Courts, for discretionary waiver of exhaustion requirements, and for issuance of injunctive relief. In all probability such a process can proceed to at least a

preliminary conclusion in a few months time. Congress, mindful of how long it could take to reach a judicial determination regarding the propriety of an election challenged under Title IV of the Act, resolved the question of who should hold union office in the interim, absent a provision governing this question in the constitution of a union,31/ for the following reasons:

> A union election should be presumed valid until the contrary can be reasonably presumed. The newly elected officers are those most likely to have the support of the members.32/

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31. Both the Secretary and AFL-CIO assert that the District Court's order was "contrary to the spirit if not the letter of 29 U.S.C. 482(a), which expresses a preference for allowing new officials to take office pending a final decision." (reference to Briefs) In so arguing both ignore the fact that this section of the Act actually provides in the first instance for a union constitution and by-laws to resolve who holds office pending resolution of a Title IV complaint. Only if not provided for therein do the newly elected officers automatically take charge of the union under the Act. Furthermore they

Application of this logic to Title I remedial processes does not lead one to the conclusion Congress reached and explicitly set forth in Title IV. Under Title I the invalidity of an election may be reasonably presumed as soon as in a matter of weeks by a preliminary judicial determination. Once a determination has been made that an election was invalidly conducted, the "newly elected officers [will not

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presume once more that the Court imposed this "contrary" scheme on the parties, when in fact the District Cout asked the parties for their views on this matter and Petitioners suggested that this should occur. Hence the union, not the Court initially decided this question. Hence too the Congressional goal of union autonomy was not frustrated by how the District Court handled this question under title I in this particular case. Indeed, the union conceivable could have appointed interim officers by vote of members attending the next membership meeting. Had Petitioners suggested the same to the Court or some other democratic alternative, there is no reason to presume either that the Respondents would not have agreed to the same, or that the Court would not have permitted it.

32. These two sentences were deleted from the legislative history quoted in the AFL-CIO's brief (note 16 at 10-11).

necessarily be] those most likely to have the [continued] support of the members."

Finally note must be made regarding the concessions of both the Secretary and AFL-CIO that not all Title I post-election relief is barred by Section 403, and their contention that Title I relief should be restricted to granting money damages.33/ (Brief for Federal Respondent at 10. The same contention is made at Brief for AFL-CIO at 10.) This assertion is unsound for several reasons. Title I, as noted above, specifically mentions injunctive relief as an available remedy.

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33. Damages awarded to dissidents against their union would, if substantial, in all probability result in a special dues assessment being made against the membership, as was done in this case simply to raise money to pay lawyers to pursue appeals. This would in most cases, as it has in this case, only serve to cause the victims of unlawful discrimination to be resented by many other union members. Such a result does not promote democracy and protect the rights to dissidents, but rather frustrates both ends.

Furthermore, given the nature of the rights protected under Title I, damages are in all probability the least appropriate form of relief possible; for such an award would not effectuate any of the purposes of the Act. Rather, in most cases it would have the opposite effect.

(2) The Different Nature of Rights Protected Under Titles I and IV Casts Serious Doubt That Title I Rights In Elections Could Be Effectively Protected By Action Of The Secretary Under Title IV Or By Precluding Injunctive Relief Under Title I

The Secretary, the Petitioners and the AFL-CIO all argue that the Courts below should have declined jurisdiction over and/or declined to grant relief remedying the violations of the Act which the Respondents established in the District Court. Rather, they assert that correction of these violations should have been left

to the Secretary to accomplish. In fact, however, this argument is misleading, because none of these briefs establishes, on the facts of this case and generally as well, that these or like violations could have been redressed by the Secretary under Title IV.34/ Given the facts discussed below, they implicitly argue that most of these violations should be left for the union to remedy or not remedy as it chooses.

The two violations complained of and the subject of the instant appeal, and a third one not appealed are violations the Secretary has no power to redress under Title IV, as he recognizes in his regulations:

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34. The Secretary's Brief assumes these violations and most others occurring after a mail ballot is sent out will be both Title I and Title IV violations; perhaps for that reason he assumes Court enforcement of Title I rights violated "during that period" "trenches on the authority of the Secretary" (Brief for

> The provisions of Title I, 'Bill of Rights of Members of Labor Organizations' (particularly section 101(a)(1) 'Equal Rights', section 101(a)(2) 'Freedom of Speech and Assembly' section and 101 (a)(5) 'Safeguards against Improper Disciplinary Action') are related to the rights pertaining to elections. [Nevertheless] Direct enforcement of Title I rights, as such, is limited to civil suit in a District Court of the United States by the person whose rights have been infringed. 29 C.F.R. 452.7 (emphasis added).

Federal Respondent at 7 & 8). Yet in fact he recognizes only the misnomination of Lynch as cognizable under Title IV (Id. at 11) and would provide redress for such a violation only if he credited Respondents' rather than union officials' version of the meeting. To prove this to the Secretary's satisfation Respondents would, of course, have no opportunity to cross-examine union officials to impeach their credibility as they do in the Court system. Not only in this case, but in many others the Secretary's enforcement of Title IV will not redress Title I violations. As noted in one comment on this subject:

> From a practical standpoint, however, the manner in which the Secretary enforces Title IV (discounting the limitations inherent in the post-election remedy itself) in many instances effectively deprives the complainant union member of any redress and leaves largely unvindicated the public interest in internal union democracy.
> "Twilight Zone," 74 Col. L. Rev. at 1117.

Unless also violations of Title IV, conduct violating Title I cannot give rise to redress under Section 403. Hence Title IV would not protect any Respondent's rights "to express at meetings of a labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting",35/ and not to "be fined, suspended, expelled or other wise disciplined" in reprisal for exercising rights protected under Title I and by procedures guaranteed thereunder.36/

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35. Section 101(a)(2) of the Act.

36. Sections 101(a)(5) and 102 of the Act. Section 401(e) only protects a member against discipline or reprisals on account of having exercised certain limited, specific rights thereunder. These include being or supporting a candidate, or voting in an election, but do not include protesting unreasonable rules or seeking to attend a meeting.

Furthermore, according to the Secretary's regulations, the denial of one member's "equal rights" to nominate candidates does not constitute a violation of Title IV's general guarantee of "a reasonable opportunity... for the nomination of candidates".37/

In the second place, even where actions violate Title IV, as the Court of Appeals noted, they are often not ones for which the Secretary would not choose to or could not grant redress:38/

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37. See 29 C.F.R 452.7; 29 U.S.C. 481(e); Note also that 29 C.F.R. 452.55-452.65 nowhere guarantees the rights of individuals to nominate candidates.

38. As noted by Justices Stewarts and Harlan in the former's concurring opinion in Calhoon, supra, citation below:

> The Court's reading of federal-court remedies available under Title I and Title IV is particularly restrictive because of the limited powers of the district judge once the balloting has occurred. Under s. 402(c), the court is confined to setting the election aside only if "the violation of section 401 may have affected the

> outcome." For the aggrieved union member this protection may be totally inadequate. The function of nominating a candidate is not always to gain the office. A faction may be vitally interested in appearing on the ballot merely to show that it is part of the political structure of the union. Under the Court's view, until such a faction approaches majority status, judicial relief in the federal courts will be absent. See Summers, Judicial Regulation of Union Elections, 70 Yale L. J. 1221, 1257 (1961).
> 379 U.S., at 146, n. 7 (emphasis added)

This same point is made a decade later in the aforementioned Columbia Law Review article, wherein that commentator notes that "the policy considerations underlying the Calhoon decision are inapposite with respect to Section 101(a)(2)." That commentatary states:

> Violations of Section 401 without the requisite probable effect are without remedy under the title; incumbents are thus licensed to violate Title IV with abandon as long as their opposition remains an electoral minority. Regardless of the flagrancy of the incumbent's conduct during the first election or the extent to which he has impaired the democratic spirit within the union, he is permitted a second chance to retain power. The actual victor of the first election may never achieve installation, for if section 401 violations mar the rerun as well, the burden is on him to file a complaint with the Secretary and begin anew the cumbersome Section 401 process.
> "Twilight Zone", 74 Col. L. Rev. at 1116.

> Relief for violations under Title IV is possible only if the wrong 'may have affected the outcome of an election.' 29 U.S.C. 482 (c)(2); see 29 C.F.R. 452.5. This test is mathematical: The Secretary of Labor will litigate under Title IV only if the number of affected ballots would have changed the outcome of the election... The result is obvious: flagrant violations may go unremedied if the number of affected ballots is too small.
> Pet. App. B at 65-66.

The exclusion of Respondent Crowley from the nominations meeting and discipline of Respondent Lunnin thereafter, if arguably Title IV violations, would not likely be viewed as arising to the level of "affect" that could enable the Secretary to redress them. In all probability the only part of the election the Secretary could or would have ordered rerun under Title IV was Griffith's running unopposed for the Secretary-Treasurer position.39/ Yet this is the most powerful office in the local

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39. Brief for Federal Respondent at 11.

union and violations regarding it could have tainted the entire election process in ways impossible to determine mathematically. In a similar context, the Second Circuit Court of Appeals recognized that under Title IV there often is no remedy for the fact that "Once suppressed 'the democratic spirit' within a union 'may not soon be revived'. Navarro v. Gannon, supra [385 F.2d 512 (2d Cir. 1967), cert. denied, 390 U.S. 989 (1968)]; 385 F.2d at 520." Schonfeld v. Penza, 477 F.2d 899, 903-4 (2d. Cir. 1973).

In the third place the particular electoral processes challenged in this case, as has been noted above, occurred in an election that the union voluntarily voided and bound itself to rerun within three months time subsequent to the close of balloting. For this reason too in this case the Secretary would be completely

powerless to grant Petitioners any redress for the violations having occurred or any guarantee that they would not have been repeated in a rerun election.

For these three reasons adoption of Petitioners' view of the Act would frustrate the Congressional objective of providing special protection to the fundamental rights guaranteed in electoral processes by Title I. No protection for Title I rights would be afforded except by voluntary action of the offending union whenever offenses which the Secretary of Labor cannot redress for any reason occur in the context of an election. In accord with this view of the Act is the recent decision of the Ninth Circuit Court of Appeals in Canez, supra.

(3) The Fact That The Secretary Of Labor Could Protect Some Title I Rights Without Permitting Pre- Or Mid-Election Injunctive Relief Under Title I Does Not Constitute A Sound Basis For Precluding Injunctive Relief Affecting Electoral Processes Under Title I

The Secretary of Labor premises many of his arguments on the assumption that the violations complained of herein could be remedied under Title IV as well as Title I and argues that the Title I remedy is preferable for the following five reasons:

> [a] avoidance of delay in the conduct of union elections; [b] resolution of such problems, where possible, by the union itself; [c] screening of frivolous complaints and [d] consolidation of apparently meritorious ones by the Secretary; and [e] reliance on the Secretary's expertise in supervising remedial elections.
> Brief for Federal Respondent at 6 (lettering added).

Though the Secretary's basic premise is, as discussed above, not a sound one, these five reasons will be discussed briefly in the context of this case to

demonstrate that they are also of little or no merit.

(a) Avoidance of Delay:

The Secretary's reference to delays remains somewhat unexplained in his Brief.40/ If it refers to the fact that the 1981 election in this case did not result in installation of new officers for approximately ten months time after they would otherwise have been installed, the argument fails to take accounts of the "test case" character of this case, the unwillingness of the union to admit ultimately uncontested facts, and the unwillingness of its affiliates to supervise a rerun election. Each of these resulted in greater delays than one would ordinarily face in future cases of this kind.

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40. See pages 35-45 therein, where the Secretary asserts, but then fails to discuss this factor at all.

More importantly, though, the Secretary's argument about avoidance of delay is at best disingenuous, since the record of the Secretary's performance in speedily resolving Title IV complaints has in effect rendered the Title IV remedy a Pyrrhic one. Even the ten month delay between the 1980 and 1981 elections encountered herein compares quite favorably with the more than two and one half years average delay encountered in cases the Secretary litigates under Title IV.41/ Given the three year term of office with which this case is concerned, the result here was that previously lawfully elected officials remained as lame ducks for 19% of the term to follow contrasts quite favorably with the cases handled by the

41. "Union Elections," supra, 81 Yale L.J. at 573.

Secretary which have resulted in unlawfully elected officials' staying in office for an average of 85% of the term for which they were unlawfully elected, a 447% longer delay. Had the Petitioners' affilliate, Joint Council 10, agreed to supervise the Court's election, the Court's order of February 12, 1981 could have gone immediately into effect, resulting in a delay of less than four months from the original installation date to the one for the 1981 election. The purpose of avoiding delays is far better served for this and other reasons 42/ by affirming the

42. Referring to Title I pre-election relief, one commentator noted:

> "Lastly, delay of the election need not be undue in such cases. Injunctions against infringements of free speech or orders to have voting at a more convenient time or place will not delay the election at all. Even a finding of inadequate notice would typically necessitate only short delays."
> "Union Elections," 81 Yale L.J. at 562 (emphasis added).

decision below than by adopting the position urged by Petitioners and the Secretary.

(b) Resolution By The Union Itself:

The facts of this case also demonstrate that affirmance of the decisions below will not frustrate the Congressional goal of resolution of such matters by the union itself, to the extent Congress had any such goal with reference to Title I.43/ The discipline of the Respondent Lunnin was in fact so resolved (Pet. App. A at 6), as were the questions of voiding the December, 1980 election and determining that a 1981 election should be

43. It is dubious Congress had such a goal with reference to Title I, wherein it made exhaustion discretionary. Though the decision in Calhoon does not require such a conclusion, Justice Stewart, joined by Justice Harlan, in fear that it might be read that way, noted in their concurring opinion:

held. Indeed, all of the District Court's order concerning the conduct of the electoral processes of the union resulted either from the union's proposing that, when, and how it be done, or from its refusing to remedy its own misdeeds. The opportunity to remedy these wrongs internally was as fully provided in the context of this Title I case as it could or might have been under Title IV.

Nonetheless, the Court finds a "general congressional policy" to avoid judicial resolution of internal union disputes. That policy, the Court says, was designed to limit the power of individuals to block and delay elections by seeking injunctive relief. Such an appraisal might have been accurate before the addition of Title I, but it does not explain the emphasis on prompt judicial remedies there provided. In addition to the injunctive relief authorized by s. 102 and the saving provisions of s. 103, s. 101(a)(4) modifies the traditional requirement of exhausting internal remedies before resort to litigation.
379 U.S. at 145.

Again it should be mentioned that unlike technical violations of Title IV, Title I violations, being in their nature more generally akin to intentionally discriminatory treatment, are inherently less likely to be corrected by the very persons who engaged in the wrong.

(c) Screening Frivolous Complaints and (e) Supervising Remedial Elections:

The Court of Appeals correctly determined that Secretary has less, not more expertise than the Courts in evaluating and screening out complaints of Title I violations because:

> The rights protected by Title I, particularly equal rights to participate in union elections, free speech, and due process, 29 U.S.C. §411 (a)(1),(2),(5) are in the nature of rights traditionally protected by the federal courts. Title I rights are not rights as to which the Secretary has particular expertise... Pet. App. B at 59.

The Secretary has not addressed at all why his expertise 44/ is greater than the Court's as regards screening Title I complaints and instead focuses only on his expertise in supervising elections.45/ Futhermore, the Secretary closes his eyes to the very facts of the case at hand, wherein the District Court below delegated this function to people with substantial expertise in supervising elections, as most any court could and would in all probability do. In fact, there is no

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44. "Second, the Secretary's 'special knowledge and discretion' are not likely to exceed the expertise of the federal bench in first amendment adjudication. Any deference to administrative expertise, moreover, would contravene the legislative determination to assign to the courts the task of adapting first amendment precedents to the special union context."
"Twilight Zone," 74 Col. L. Rev. at 1132 (footnote omitted).

45. "The Secretary... provides only nominal supervision of court-ordered reruns." Id., at 1117.

reason the Courts could not appoint former employees of the Secretary who have become private attorneys or arbitrators, many of whom would have more years of precisely that kind of experience than most of the Secretary's present employees. Furthermore, there is no reason the Courts could not promote union self-regulation by appointing intermediate or higher union bodies to supervise rerun elections as the Court attempted to do in the instant case. Surely, these entities are not lacking in the requisite expertise.

Nor has the Secretary made much of any case for two other propositions he simply assumes are correct: that Title IV processes will be less disruptive to unions than Title I pre-election relief; and that his supervision of union elections is particularly expert or helpful. The

commentators who have objectively addressed themselves to these propositions tend to believe both are of little merit.46/

Simply stated, by these arguments the Secretary urges this Court not to uphold the will of Congress, but to ignore it.47/

46. One commentator notes:

> Although pre-election suits may be unsettling, reruns resulting from post-election suits are even more disruptive. They appear to cause far more emotional strain and loss of time for all candidates. In cases where an election violation is likely to result in a rerun, it is to the union's benefit to have the defect remedied before the election. Secondly, it seems highly unlikely that the availability of pre-election relief will greatly increase the number of suits brought against unions.

"Remedies," 81 Yale L.J. at .

See also comments in "Twilight Zone," 74 Col. L. Rev. at 1137-8 and "Union Elections," 42 U. Chi. L. Rev. at 179-80.

47. There is no doubt that Congress explicity voted that the Secretary not be charged with the duty of enforcing Title I rights. In successfully urging that the Secretary not be charged with this duty, Senator Kuchel cited the "interest of justice" (105 Cong. Rec. 6720 (1959)).

(d) Consolidation of Meritorious Complaints:

Finally, the Secretary ignores the self-evident fact that Title I suits regarding elections do not defy consolidation. Quite to the contrary, they will most often be brought in a consolidated fashion, as the instant one was, and even if not, would be considered to be related cases, assigned to a single

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Senator Kefauver explained his reasons for the same thusly:

> I wish to congratulate the sponsors of the [Kuchel] amendment on the amendment they have presented, leaving out section 103 [of the McClellan amendment], which, as has been stated, would put the Secretary of Labor in the middle of actions of every labor union in the United States and give him the right to institute suits at his will. It would be very difficult to carry on management-labor relations in the public interest if an unthoughtful Secretary of Labor wished to interfere. This section, plus the absence of a requirement for jury trials, were the principal reasons I voted against the McClellan amendment.
>
> 105 Cong. Rec. 6726 (1959)

judge, and in most instances, formally consolidated as well.

B. THE PROCEDURES ESTABLISHED UNDER TITLE IV OF THE LMRDA DO NOT BAR A COURT FROM GRANTING PRE-ELECTION RELIEF AFFECTING THE CONDUCT OF AN ELECTION WHEN TITLE I OF THE ACT HAS BEEN VIOLATED

(1) The Legislative History Demonstrates That Title IV Was Not Intended To Preempt Pre-Election Remedies, State or Federal

The assertion of Petitioners and the AFL-CIO that Congress intended Section 403 of the Act to preclude any Title I election remedies for violations that occur after the election process has commenced is tantamount to asserting (a) that Congress intended to give more preferred treatment to then-existing state law remedies than to those in Title I, and (b) that Congress intended that election related violations be in effect not remediable under Title I

of the Act. There is no support for either of these two propositions in the Congressional history of the Act.

As argued extensively in Section IIA(1), supra, the legislative history of Title I demonstrates that its references to electoral rights are not the result of Congressional oversight, but of the conscious design of Congress. So too, the legislative history of Title IV demonstrates that Section 403 was neither directed at Title I nor intended to preclude remedies thereunder as soon as the electoral process has commenced.48/

48. "On this point, Title IV's legislative history is equally unclear, but there is no evidence of a Congressional intent to foreclose generally federal pre-election relief. When one considers the patent limitations upon the effectiveness of Title IV's post-election remedy, the argument that Congress could not - and did not - intend to foreclose all pre-election relief is demonstrably stronger."
"Twilight Zone," 74 Col L. Rev. at 1113-4.

Indeed, to read such an intent into the Act or the aforerelated statements of supporters of the amendments creating Title I requires the same total rewriting of the terms of Title I that the Secretary's "oversight" argument does.49/

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49. The Petitioners' Brief cites a study of New York State cases by Professor Clyde Summers in which they quote him as saying the casting of ballots concludes the election process. Although Summers says this when the ballots are cast in person and hence counted within hours of the casting of the first ballot, Professor Summers goes on to say, "when mail ballots are used and voting extends over weeks or months, injunctions may be sought either to void the voting or to protect the handling of ballots." The thrust of Professor Summers argument which was written before the passage of the LMRDA and thus took into account only Title IV actions and did not consider Title I issues at all, was the preservation of union democracy via free and democratic union election. In this vein Professor Summers says, "the great majority of suits are... brought prior to voting, and the New York Courts have not hesistated to correct the process in mid-course. If members are forcibly prevented from making nominations, or if candidates are wrongfully stricken from the ballots, the election must be a nullity. C. Summers, "Judicial Regulation of Union Elections," 70 Yale L. J. 1243 (1961) at 1245.

Congress explicitly preserved pre-election state law remedies from the preclusive scope of Section 403 of the Act because many of its members did not want only the limited rights provided under the Act available to union members.50/ Title

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The major concerns Summers expresses in regard to judicial intervention are correction of election defects with a minimum of costs (e.g. those of new election) and "more importantly avoidance of internal disruption caused by the lack of legitimatized leadership and the turmoil of another and more bitter campaign."

50. See Calhoon, supra, at 146. To interpret "pre-election" more narrowly places the Court in the dilemma of reaching an interpretation quite at odds with the intent of Congress and the words of the Act itself, as noted by the court in Kupau, supra:

> Language in Dunlop v. Bachowski, 421 U.S. 560, 566, 95 S. Ct. 1851, 1857, 44 L.Ed. 2d 377 (1975), suggests that Title I relates only to pre-election conduct. It is difficult to take such a suggestion literally since Title I relates expressly to voting, which is not pre-election conduct. 622 F.2d at 456

I was unquestionably intended to supplement the rights guaranteed by Title IV and the state and commmon law pre-election remedies left intact under Section 403. Since all parties hereto concede that Congress felt it was safe and proper to preserve those remedies, which included -

> a decree in equity ousting the officers or ordering an election;... to supervise the conduct of an election;... to enjoin an international president from interfering with a local election;... (and) to intervene in union elections...
> Cox, "The Role of Law in Preserving Union Democracy," 72 Harv. L. Rev. 609 (1959) at 625-626

prior to the conduct of an election under Title IV, it is hard to understand why at minimum the same should not be true for Title I remedies, which Congress created for the same reason it preserved pre-election state law remedies.

(2) Policy Considerations Mandate That Title I Remedies Affecting The Conduct Of Elections Be Permitted At Least Until All The Ballots Have Been Counted

Pre-election enforcement of Title I rights is in no way inconsistent with the goals or policies of either Title, as the commentators who have examined the implications of the decision of this Court in Calhoon have concluded.51/ With regard to the question of when an election has been "already conducted" within the meaning of Section 403 of Title IV, 29 U.S.C. 483, the Court of Appeals held in the instant case the election had not already been conducted when the ballots had been sent out, some returned and none counted.52/

51. See "Union Elections," 81 Yale L.J. at 178-9; "Remedies," 42 U. Chi. L. Rev. at 179; and "Twilight Zone," 74 Col. L. Rev. at 1137.

The Court concluded that the legislative history, case law, the common sense meaning of the phrase, and policy considerations all supported such a conclusion (Pet. App. B at 62-67).

Though Petitioners initially argued that there were two Circuit Court decisions conflicting with this conclusion of the First Circuit Court of Appeals, they now contend that there are only two decisions, both district court decisions, concerning mail ballots that even arguably fit such a description. A review of even these two decisions reveals neither one to have relied for its holding on such a

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52. Though the Court of Appeals concludes that in general an election is not "already conducted" until all the ballots are counted (Pet. App. B at 67), this is not a necessary part of its holding.

conclusion.53/ Furthermore, the aforementioned recent decision of the Ninth Circuit in Canez, supra is in accord with the decision of the First Circuit in the instant case.

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53. Despite discussing the question of when a mail ballot election has been "already conducted" under s. 403 of the LMRDA, 29 U.S.C. s. 483, in both of these decisions the courts examined the merits of claims presented and concluded that no Title I claim was presented. Laski v. Intern. Organization of Master, Mates and Pilots, 502 F.Supp. 134, 136-7 (S.D.N.Y. 1980); New Action Coalition v. Local 2, United Federation of Teachers, 510 F.Supp. 1208, 1212-4 (S.D.N.Y. 1981). Hence, neither decision can fairly be said to have relied on its conclusion as to when "an election (is) already conducted."

Furthermore, even if the New Action decision could be so interpreted, that decision, unlike the instant case, concerned a case where the "counting of the ballots... [had] been substantially completed" prior to the Court's consideration of the Plaintiffs' request to enjoin tabulation. 510 F.Supp. 1208, 1210.

The same may have been the case in Laski, supra, where the ballots had been mailed a full month and a day before the Court ruled on Plaintiffs' request to preliminarily enjoin their tabulation. 502 F.Supp. at 134-5.

Additionally, as noted heretofore, the Secretary has done a complete turnabout in his position to this Court on this question. Unlike the stance he took in his brief in support of the Petition for a Writ of Certiorari in this case, the Secretary's current stance is that he believes an election is already conducted "no later than when the tally of the ballots is begun." (Brief for Federal Respondent, 43-44 at n.19). Since the facts of the instant case are that the tally had not begun when relief was granted Respondents by the District Court,54/ the Secretary

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54. The instant appeal does not concern an election in which suit was filed after all the ballots were cast, or in which the Court intervened after all the ballots were cast and collected, much less after they were counted. Indeed the record is silent as to whether all the ballots had even distributed as of said date.

now would appear to be arguing for affirmance of at least this aspect of the holding of the Court of Appeals herein.

As Justice Stewart, joined by Justice Harlan, notes in concurrence in Calhoon, neither language of the LMRDA nor the policies underlying it support the conclusion that Title I rights may not be enforced through suits brought prior to the tally of votes:

> Even [section] 403 is not conclusive in the elimination of pre-election remedies. At the least, state-court actions may be brought in advance of an election to "enforce the constitution and by-laws." And as to federal courts, it is certainly arguable that recourse through the Secretary of Labor is the exclusive remedy only after the election has been held. By reading Title I rights so narrowly, and by construing Title IV to foreclose absolutely pre-election litigation in the federal courts, the Court sharply reduces meaningful protection for many of the rights which Congress was so assiduous to create. By so simplifying the tangled provisions of the Act, the Court renders it virtually impossible for the aggrieved union member to gain a

> hearing when it is most necessary - when there is still an opportunity to make the union's rules comport with the requirements of the Act. 379 U.S. at 145-6.

Petitioners' arguments regarding these policy issues have been briefly discussed in Section IIA of this brief. Herein Respondents will only address a few of opposing parties' arguments not replied to therein. Petitioners maintain that remedies of the kind permitted by the District Court and the Court of Appeals in this case burden the party responsible for unlawful actions with the costs of attorneys fees and rerunning its own election (Brief of Petitioners at 35-36). Yet it was precisely because the alternative would be to burden the public coffers with these administrative and litigation costs that members of the House of Representatives supported the adoption of the Kuchel amendment.55/ In doing so

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55. See note 20 herein.

they flatly rejected the position urged by Petitioners and solidly adopted the one implicitly urged by Respondents and adopted by the Court of Appeals.

Likewise, deference to internal union processes will often not be appropriate when dealing with Title I pre-election claims. As one commentator noted:

> Most allegations of infringement of rights to participate in the electoral process will fulfill the proposed criteria for granting pre-election relief. Internal exhaustion will often be futile, for the charge of abridging participatory rights will be directed at the very officers who would be hearing any internal appeal. Pre-election appeal beyond the local is often unavailable. Courts should in these instances find internal exhaustion unnecessary. The issues involved in suits to enforce participatory rights will often be purely factual and the relevant principles clear.
> "Union Elections," 81 Yale L.J. at 562.

Finally, while there might be some unfairness in permitting a member to wait to see what the results of an election are before deciding whether to seek to have a

violation of Title I corrected thereunder, there is no like unfairness in permitting a candidate to do so before the ballots have been counted.

Hence at a minimum this Court should concede that pre-election relief under Title I is a desirable and necessary remedy to advance the primary objective of both Titles I and IV of the LMRDA: protecting and fostering internal union democracy.

Conclusion

For the reasons set forth in Part I above the instant writ should be dismissed as moot and/or improvidently granted; in the alternative, for the reasons set forth in Part II above the order of the Court of Appeals should be affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

LOCAL NO. 82, FURNITURE AND PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN, AND PACKERS, ET AL., PETITIONERS

v.

JEROME CROWLEY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether the enforcement scheme created by Title IV of the Labor-Management Reporting and Disclosure Act of 1959 for violations of the Act occurring in the course of a union officer election precludes a court from enjoining the counting of ballots and ordering a new election under court supervision to remedy violations of Title I of the Act that occurred at a nominations meeting.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-432

LOCAL NO. 82, FURNITURE AND PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN, AND PACKERS, ET AL., PETITIONERS

v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 41a-93a) is reported at 679 F.2d 978. The opinion of the district court (Pet. App. 1a-40a) is reported at 521 F. Supp. 614.

JURISDICTION

The judgment of the court of appeals (Pet. App. 94a) was entered on May 21, 1982. A petition for rehearing was denied on June 15, 1982 (Pet. App. 95a). The petition for a writ of certiorari was filed

on September 13, 1982, and was granted on January 24, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. 411-412, 481-483, are set out at Pet. App. 96a-103a.

STATEMENT

1. On November 9, 1980, a meeting was held to nominate candidates for the seven-member executive board of petitioner Local No. 82, Furniture and Piano Moving, Furniture Store Drivers, Helpers, Warehousemen, and Packers ("Local No. 82"). The election was a controversial one, and several disputes arose in the course of the nominations meeting. One concerned the requirement that members of Local No. 82 show a computerized dues receipt in order to be admitted to the meeting (Pet. App. 43a). The district court found that such a requirement had not been imposed at earlier meetings (*id.* at 19a). Several members, including respondent Jerome Crowley, were denied admission for lack of a receipt (*ibid.*).

The second controversy occurred when nominations were made. Petitioner Bart Griffiths, the incumbent secretary-treasurer of Local No. 82 who was conducting the meeting, was nominated for reelection to that position. The district court found that respondent John Lynch also was nominated for secretary-treasurer, although Griffiths ignored the nomination and announced that he was running unopposed (Pet. App. 21a). Griffiths included Lynch among the candidates for president (*id.* at 44a).

Crowley, Lynch, and others filed a protest concerning the conduct of the nominations meeting with Local No. 82, with Teamsters Joint Council 10, and with the International Union. On November 20, 1980, Local No. 82 denied the protests.[1] Ballots were thereafter mailed to the members (Pet. 4), who were instructed to mark and return the ballots by mail to a designated post office box before 9:00 a.m. on December 13, 1980, when they were to be counted. Respondent Lynch's name appeared on the ballot as a candidate for president, and not for secretary-treasurer (Pet. App. 116a).

2. On December 1, 1980, respondents filed this action in the United States District Court for the District of Massachusetts on behalf of themselves and two classes of members (not certified by the district court) against petitioners Local No. 82, Griffiths, the president of the Local, and members of its election committee. Respondents alleged that petitioners had violated several provisions of Title I of the LMRDA and sought preliminary injunctive relief (Pet. App. 2a-3a, 44a-46a). In particular, respondents claimed that restricting admission to those with dues receipts and the failure to recognize Lynch as a candidate for secretary-treasurer violated their equal rights to nominate candidates and to attend membership meetings, provided by Section 101(a)-(1) of the Act, and their right to meet and assemble freely with other members and to express views upon candidates, provided by Section 101(a)(2) of the Act. 29 U.S.C. 411(a)(1) and (2).[2]

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[1] A hearing before Joint Council 10 was cancelled when this action was filed. No action was taken by the International Union (Pet. App. 15a-16a).

[2] Respondents also made several claims under Titles I and IV concerning increases of local dues and concerning the union

At 4:20 p.m. on December 12, 1980, about 16 hours before the ballots were to be counted, the district court issued a temporary restraining order preventing Local No. 82 from counting the ballots (J.A. 2). Seven months later, on July 13, 1981, the court issued a preliminary injunction declaring that the nominations received at the November 9, 1980 meeting were "legally without effect" and ordering a new nominations meeting and mail ballot election to be conducted and supervised by Lawrence Katz and the Honest Ballot Association of New England ("the arbitrators") (Pet. App. 86a). The injunction set forth in detail the eligibility requirements for attendance at the nominations meeting, candidacy for office, and voting, and directed that disputes about eligibility would be resolved by the arbitrators (*id.* at 87a-91a). It also provided that the arbitrators were to make arrangements consistent with the union's bylaws and constitution for distribution of campaign literature (*id.* at 91a).

3. Petitioners appealed, and the Secretary of Labor intervened in the appeal. They argued that the district court lacked authority to enjoin the tabulation of ballots and order new court-supervised nominations and a new election to remedy Title I violations occurring in the course of the election.[3] Peti-

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rule that only members who have paid their dues on time for the 24 months preceding the nominations meeting may be candidates (Pet. App. 7a-8a). The district court declined for a variety of reasons to grant preliminary relief on these claims (*id.* at 12a, 22a-23a, 25a-37a).

[3] Respondents have suggested, in a Motion To Limit Issues In Writ Of Certiorari And/Or To Dismiss Writ As Improvidently Granted (denied Mar. 21, 1983), that this case does not properly present the issue whether the district court had

tioners and the Secretary contended that under those circumstances the exclusive remedy was the procedure afforded in Title IV of the LMRDA, which provides that a member complaining of election violations must, after exhausting his remedies within the union, file a complaint with the Secretary. 29 U.S.C. 482. If, after investigation, the Secretary finds probable cause to believe that a violation has occurred, he may initiate an action to have the election set aside and a new one conducted "under

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authority to enjoin the union's December, 1980 election. That is so, respondents argued, because on January 9, 1981 the union informed the district court that it was prepared to hold a new nominations meeting and mail ballot election (see J.A. 53, 97, 100). Respondents' point seems to be that since the union, like the district court, was dissatisfied with the conduct of the 1980 election, it suffered no harm when the district court entered a temporary restraining order enjoining the counting of ballots.

Respondents' argument ignores several obvious points. The first is that the Secretary's brief in the court of appeals specifically challenged the propriety of the district court's TRO as an improper interference with the Secretary's enforcement powers under Section 402 (29 U.S.C. 482), and the court of appeals explicitly sustained the district court's power to enjoin the election (Pet. App. 61a, 67a). The second is that the union itself suffered harm under the statute from the TRO even if it was willing to conduct a new election. Section 402(a) of the Act (29 U.S.C. 482(a)) states that a "challenged election shall be presumed valid pending a final decision thereon * * * and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide." This means that, but for the district court's TRO, those elected in the 1980 election (rather than the incumbents) would have conducted the union's affairs until a new election could be held. As we explain in more detail below, pages 29-30, the purpose of Section 402(a) is to preserve as much as possible the union's autonomy in the election process.

supervision of the Secretary" (*ibid.*). Section 403 (29 U.S.C. 483) also provides that "[t]he remedy provided by this subchapter for challenging an election already conducted shall be exclusive." Petitioners and the Secretary argued that to permit court-ordered and supervised elections as a remedy for violations of Title I would frustrate the very purposes underlying Title IV: avoidance of delay in the conduct of elections, resolution of such problems, where possible, by the union itself, screening of frivolous complaints and consolidation of apparently meritorious ones by the Secretary, and reliance on the Secretary's expertise in supervising remedial elections.

The court of appeals affirmed (Pet. App. 41a-85a). The court found no indication in the decisions of this Court that Title IV remedies, including ordering a new election, were intended to displace the relief available to a court in actions under Title I (*id.* at 49a-52a). It also determined that the legislative history of the LMRDA revealed "no evidence that limitations on Title I by Title IV were ever contemplated" (*id.* at 58a-59a). The court found inapplicable the "exclusive remedy" provision in Section 403 since, it concluded, an election is not "already conducted" within the meaning of that section "until all the ballots are counted" (*id.* at 67a)—a situation that, due to the district court's temporary restraining order, was prevented from occurring in this case.[4]

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[4] The court of appeals also rejected claims by petitioners that the preliminary injunction was improper under traditional equitable principles and that the district court had improperly refused to require respondents to post a bond (Pet. App. 68a-82a).

Judge Campbell dissented. He would have held that "the proper accommodation between Title I and Title IV requires consideration not only of the stage which the election process has reached but the nature of the relief" (Pet. App. 83a). Judge Campbell concluded that, if a new supervised election would be required to remedy the asserted election violations, "many concerns argue against finding Title I jurisdiction: intrusiveness, delay, disruption, and the court's lack of expertise in this area, especially as compared to the Secretary" (*ibid.*).

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 403 of the LMRDA (29 U.S.C. 483) allows courts to enforce rights under a union's constitution and bylaws, and under Title I of the Act (see 29 U.S.C. 412), "prior to the conduct" of an officer election. The same section also states that "[t]he remedy provided by [Title IV] for challenging an election already conducted shall be exclusive." While that division of authority between the courts and the Secretary of Labor suffices to resolve many doubts about the proper procedure for seeking redress of rights guaranteed by the Act, it does not clearly address all the kinds of problems that can arise in the course of a mail ballot election. Depending on how one reads the division of authority, there may be a period of weeks from the time immediately "prior to the conduct" of the election to the time when the election is "already conducted." Many violations that can occur during that period will contravene both Titles I and IV of the Act.

The question in this case is what authority a court has, when asked to act under Title I, to remedy such violations. In particular, the issue is whether a

court may remedy Title I violations by enjoining the counting of ballots and ordering a new election under court supervision. We submit that such relief is not "appropriate" (29 U.S.C. 412), because it trenches on the authority of the Secretary under Title IV and on the interests of labor organizations that the scheme for secretarial enforcement was designed to protect.

I.

The legislative history of the LMRDA shows that Congress had little confidence in the ability of courts to remedy Title I violations by ordering and conducting new elections. The Kennedy-Ervin bill that became the Act was introduced in the Senate. It gave the Secretary of Labor exclusive authority to enforce its proposed election guarantees and to supervise any new election that a court might order at the Secretary's behest. As Professor Archibald Cox (a principal consultant to the draftsmen) pointed out during the Senate hearings, such a provision was necessary because "[a] court is * * * a clumsy instrument for supervising an election." *Senate Hearings, infra* page 14, at 133. For that reason state-law remedies that could not be provided in advance of an election were preempted.

The Kennedy-Ervin bill included no bill of rights like that now found in Title I of the Act. It was amended three days before passing the Senate to include a bill of rights enforceable by the Secretary of Labor, who was authorized to seek "appropriate" relief, including injunctions. Two days later the provision for enforcement by the Secretary was itself amended because of a concern that allowing the government to seek injunctions would establish a precedent for federal enforcement of civil rights laws. In-

stead of the Secretary, individual members were authorized to seek "appropriate" relief. There is no indication that the hurried passage of Title I was intended to afford a procedure—parallel to the carefully designed structure in Title IV—for ordering and conducting new union elections under judicial supervision. In fact, Senator Goldwater observed after Title I was added that Title IV's remedial structure would prevent a federal court from appointing its own monitors to supervise a court-ordered election.

The Landrum-Griffin bill introduced in the House simply incorporated without reconsideration the bill of rights passed by the Senate. Title IV of the House bill (which dealt with elections) provided, like Title I, for enforcement by individual members, but specified that new elections were to be supervised by the Secretary. The absence of a similar specification in Title I strongly suggests that a new election was not considered to be "appropriate" relief under that title.

II.

The remedial structure created by Title IV embodies a congressional concern to protect—to the maximum extent possible consistent with individual members' rights—the union's interest in self-government via the election process. When courts order and conduct new elections under Title I they ignore the principle of union autonomy that Congress built into the Act. Title IV requires elections to be held at specified regular intervals. 29 U.S.C. 481(a), (b) and (d). It also provides that any challenged election shall be presumed valid pending a final decision about alleged improprieties. 29 U.S.C. 482(a). A court order directing a new election is immediately appealable, but

to avoid prolonging uncertainty may not be stayed pending appeal. 29 U.S.C. 482(d). To "preserve[] a maximum amount of [union] independence and self-government" (*Senate Hearings*, *infra* page 14, at 134), only the Secretary is authorized to sue for Title IV violations, and members may not seek his assistance before exhausting remedies within the union. 29 U.S.C. 482(a). The Secretary may not sue to upset a union election unless he finds probable cause to believe a violation has occurred (29 U.S.C. 482(b)), and a court may not overturn an election at the Secretary's request unless—after a trial on the merits—it finds that the violation may have affected the outcome of an election. 29 U.S.C. 482(c). Title IV also directs that any new election must be supervised by the Secretary. *Ibid.* Finally, it specifies that "[t]he remedy provided by this [title] for challenging an election already conducted shall be exclusive." 29 U.S.C. 483.

As this case demonstrates, some election violations may contravene both Titles I and IV. In those circumstances, while some kinds of relief under Title I may be appropriate, a new election may be ordered only under Title IV. Any other rule would trench impermissibly on the protection for union self-government built into that title. In this case, ordering a new election under Title I delayed the union's triennial election an entire year beyond the period fixed by statute. 29 U.S.C. 481(b). It also resulted in retaining the incumbents in office a year beyond their term, contrary to the spirit if not the letter of 29 U.S.C. 482(a), which expresses a preference for allowing new officials to take office pending a final decision. By entertaining an action by members the district court also disregarded Title IV's exhaustion

requirement and the Secretary's control over whether to seek a new election (29 U.S.C. 482(a)-(b)), both procedures designed to protect union "independence and self-government." And though the Secretary would himself have sought a new election for a nominations violation like the one alleged here, many Title I violations that a court might try to remedy with a new election may not affect the outcome of an election. 29 U.S.C. 482(c). Directing a new election by preliminary injunction is still another departure from the scheme envisioned by Title IV, which permits a court to order a new election only after a trial on the merits. *Ibid.* Finally, and most obviously, the relief in this case contravenes Congress's direction that new elections should be supervised by the Secretary. *Ibid.*

III.

This Court's decisions have recognized two principles expressed by Congress in the legislative history and embodied in the Act. The first is that the Secretary's expertise must be used in deciding whether to order a new election, and in supervising the conduct of such an election. The second is that in tinkering with the election process courts should preserve the "'maximum amount of independence and self-government'" for unions. *Wirtz* v. *Bottle Blowers Ass'n*, 389 U.S. 463, 472 (1968); *Calhoon* v. *Harvey*, 379 U.S. 134 (1964); *Trbovich* v. *United Mine Workers of America*, 404 U.S. 528 (1972); *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975). The action of the district court ignores both those principles.

ARGUMENT

I. THE LEGISLATIVE HISTORY OF THE LMRDA SHOWS THAT CONGRESS THOUGHT COURTS WERE ILL-EQUIPPED TO REMEDY TITLE I VIOLATIONS BY ORDERING NEW ELECTIONS

The legislative history of Title IV of the LMRDA, which was the subject of hearings, careful committee review, and floor debate over two sessions of Congress, demonstrates a considered congressional judgment that courts are poorly suited to order and conduct new elections without the expert assistance of the Secretary of Labor. Though there was little explicit discussion of how Title I's bill of rights (added on the floor three days before the bill passed the Senate) would fit together with that remedial scheme, it is clear from the discussion and the purposes of Title I that it was not intended to displace the central enforcement provisions of the elections title.

A. The Senate Consciously Rejected Judicial Supervision Of Elections In Favor Of Enforcement And Oversight By The Secretary

The original proposal for what eventually became the LMRDA was the Kennedy-Ives bill passed by the Senate in the 85th Congress. S. 3974, 85th Cong., 2d Sess. (1958). Like the Act ultimately adopted, it provided for enforcement of election guarantees by the filing of a post-election complaint with the Secretary of Labor, who would determine after investigation whether to seek a court order for a new election. If a new election was held, it was to be under the supervision of the Secretary. "State laws and State remedies [were specifically excluded] in the election area." S. Rep. No. 1684, 85th Cong., 2d Sess. 13 (1958).

The Kennedy-Ives bill failed to pass the House, and in 1959 the Kennedy-Ervin bill was introduced. S. 505, 86th Cong., 1st Sess. (1959). Like its predecessor, the Kennedy-Ervin bill gave to the Secretary the exclusive remedy for election violations. *Id.* § 303. Its chief rival—the administration bill introduced by Senator Goldwater—would have authorized election enforcement through civil actions filed by union members as well as actions by the Secretary. S. 748, 86th Cong., 1st Sess., § 302(d) (1959). The Senate Committee on Labor and Public Welfare considered these and other bills, and after hearings and executive sessions reported out the Kennedy-Ervin measure as a clean bill renumbered S. 1555, 86th Cong., 1st Sess. (1959). S. 1555 carried forward the ideas that enforcement should be left exclusively to the Secretary and that any new election should be carried out under his supervision. *Id.* §§ 302-303. The Committee Report explained:

> [S]ince the bill provides an effective and expeditious remedy for overthrowing an improperly held election and holding a new election, the Federal remedy is made the sole remedy and private litigation would be precluded.

S. Rep. No. 187, 86th Cong., 1st Sess. 21 (1959).[8]

The bills considered by the committee did not include the bill of rights that later became Title I, so there was no discussion of a possible conflict of remedies between the elections title and the bill of rights.

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[8] The Committee also emphasized that the bill's requirement that members exhaust internal remedies before going to the Secretary "preserves a maximum amount of independence and self-government by giving every international union the opportunity to correct improper local elections." S. Rep. No. 187, *supra*, at 21.

There was, however, extended consideration of how the elections title would mesh with the judicial remedies that existed under state law. Of particular significance are the views expressed by Professor Archibald Cox, "a principal consultant to the draftsmen * * *." *Trbovich* v. *United Mine Workers of America*, 404 U.S. 528, 535 (1972). Professor Cox endorsed the creation of federal standards for officer elections and federal remedies for election violations in large part because of the inadequacy of state law. *Labor-Management Reform Legislation: Hearings on S. 505 et al. Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 86th Cong., 1st Sess. 132-136 (1959) ("*Senate Hearings*"). A major deficiency of common law remedies was the inherent inability of courts to supervise elections (*id.* at 133-134; footnotes omitted):

> A court is also a clumsy instrument for supervising an election. The judicial process may be suitable for determining the validity of an election which has already been held; but if it is found invalid, or if no election has been held, judges have few facilities for providing an effective remedy. Merely to order an election might turn the authority to conduct the balloting over to the very same officers whose misconduct gave rise to the litigation. The court has no tellers, watchers, or similar officials. It would become mired in the details of the electoral process. To appoint a master to supervise the election would delegate the responsibility, but the master would face many of the same problems as the judge. Probably it is the consciousness of these weaknesses that has made judges so reluctant to interfere with union elections, though apparently a few court-conducted elections have been held.

For that reason, among others, Professor Cox supported the exclusivity provision in the Kennedy-Ervin bill—the predecessor of Section 403.[6] Substantively, the exclusivity provision eliminated rivals to the federal elections standards and thereby fulfilled the "need for uniformity" (*Senate Hearings*, *supra*, at 135). But it also addressed the remedial shortcomings Professor Cox had identified. Because a court was such a "clumsy instrument for supervising an election," it was important to "centralize control of the proceedings in the Secretary of Labor" (*ibid.*). The exclusivity provision did that by precluding private suits and channeling elections complaints through the Secretary. And if a court decided at the Secretary's behest "to direct the conduct of an election," it would be "under the supervision of the Secretary and in accordance with * * * such rules and regulations as the Secretary may prescribe." S. 505, *supra*, § 302(b).

Professor Cox did feel that the exclusivity provision was broader than it had to be. If a private suit were filed "in advance of the election" it might be possible to "pre[v]ent the evil before it is accomplished" (*Senate Hearings*, *supra*, at 135). Professor Cox suggested by way of example suits seeking relatively mechanical relief: "actions * * * to compel the officers to comply with provisions of the constitution and bylaws such as putting a candidate's name on the ballot, permitting a classification of members to vote, or giving adequate notice of the elections" (*ibid.*).

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[6] At that time the exclusivity section (S. 505, *supra*, § 303) provided:

> The duties imposed and the rights and remedies provided by this title shall be exclusive, and no labor organization subject to the provisions of this title shall be required to conduct elections of officers with greater frequency or in a different form or manner than is required by this title.

But allowing such actions would not undermine the Secretary's exclusive control over challenges to "the validity of an election" (*Senate Hearings*, *supra*, at 135). In the first place, relief afforded "in advance of the election" need not entail delay and its consequences —such as maintaining the incumbents in office.[7] In the second place, the kind of pin-point relief hypothesized by Professor Cox would not require a court to get "mired in the details of the electoral process" (*id.* at 133-134) or to prescribe rules that might be inappropriate for the customs and circumstances of a particular union.[8] Third, the policing needed for the examples offered would be relatively simple, not involving the "tellers, watchers, or similar officials" (*id.* at 133) required for a supervised election. Finally, pre-election suits would not necessarily frustrate the

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[7] In committing post-election enforcement to the Secretary, Congress faced a "choice * * * between keeping the old officers in office or allowing the new officers to enter upon their duties even though their right may be challenged." S. Rep. No. 187, *supra*, at 22. Congress favored the latter, in part because an "election should be presumed valid until the contrary can be reasonably established" (*ibid.*), in part because "[t]he newly elected officers would be more likely to have the support of the members" and "[t]here would be less disruption of normal procedure within the union." Cox, *The Role of Law in Preserving Union Democracy*, 72 Harv. L. Rev. 609, 634 (1959).

In this case, the district court's temporary restraining order and injunction resulted in delaying the election, and maintaining the incumbents in office, for an entire year.

[8] In this case, rather than directing that Lynch's name be put on the ballot as a candidate for secretary-treasurer, the district court's order directed the running of an entirely new election under court supervision. It set forth eligibility requirements for attendance at the nominations meeting, candidacy for office, and voting, and directed that disputes about eligibility would be resolved by the arbitrators (Pet. App. 87a-91a).

interest in finality that attached once an election was held (*id.* at 135):

> An election is an integer. Its validity should be adjudicated once and for all in one forum. To permit State court actions would open the way to unnecessary harassment of the union on one side and to friendly suits aimed at foreclosing the Secretary's action on the other.

The court of appeals (Pet. App. 63a), in concluding that the exclusivity provision (now Section 403) did not bar judicially supervised elections in Title I cases, stressed Senator Kennedy's statement that "[p]rior to the day of an election an individual can sue in a State. The day after an election the Secretary of Labor assumes jurisdiction." 105 Cong. Rec. 6485 (1959). But the division of authority drawn by the exclusivity provision, as Professor Cox's testimony makes clear, is functional as well as temporal. The statement in that provision (S. 505, *supra*, at § 303) that the "remedies provided by this title shall be exclusive" rested on the perception that "[a] court is * * * a clumsy instrument for supervising an election." *Senate Hearings*, *supra*, at 133. See also Pet. App. 83a (Campbell, J., dissenting) ("the proper accommodation between Title I and Title IV requires consideration not only of the stage which the election process has reached but the nature of the relief"); Note, *Pre-Election Remedies Under the Landrum-Griffin Act: The "Twilight Zone" Between Election Rights Under Title IV and the Guarantees of Titles I and V*, 74 Colum. L. Rev. 1105, 1124 (1974).

B. The Addition Of Title I On The Senate Floor Did Not Authorize Judicially Supervised Elections

S. 1555 was reported out of committee on April 14, 1959, and debate began on it the next day. On April

22, 1959 Senator McClellan proposed adding a bill of rights that became Title I. 105 Cong. Rec. 6475. Senator McClellan's version, though in many ways broader than the version ultimately included in the Act, did not specifically mention the rights "to nominate candidates," "to attend membership meetings" (29 U.S.C. 411(a)(1)), and "to express any views * * * upon candidates" (29 U.S.C. 411(a)(2)), upon which respondents rely in this case. 105 Cong. Rec. 6475 (1959); see Pet. App. 6a-7a, 22a. Senator McClellan's proposal also vested authority for enforcement of Title I in the Secretary, rather than in individual members. His amendment stated (105 Cong. Rec. 6476 (1959)):

> "SEC. 103. The Secretary, whenever it shall appear that any person has violated or is about to violate any of the provisions of this title, may bring an action in a district court or other court of the United States for such relief as may be appropriate including, but without limitation, injunctions to restrain any such violations and to compel compliance with this title."

The amendment was adopted that same day. 105 Cong. Rec. 6492-6493 (1959). Almost immediately, however, there was strong sentiment for modification. As a substantive matter, objections arose to the absolute terms in which the bill of rights was couched. See Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 851, 858-859 (1960) ("Aaron"); Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 832-833 (1960) ("Cox, *Internal Affairs*"). But there were also strenuous objections to the provision for enforcement by the Secretary of the rights guaranteed. There is no indication that the Senate had changed its mind about the courts'

competence to supervise elections, nor even that it had the election process in mind when it reconsidered the enforcement provisions. Rather, the principal objection to secretarial enforcement by way of injunction was that it would set what some viewed as an undesirable legislative precedent for federal enforcement of civil rights laws. As Senator Johnston of South Carolina stated (105 Cong. Rec. 6696 (1959)):

> This bill gives the Secretary of Labor power to force integration of thousands of union locals and certainly would set an example or a pattern for the Attorney General to follow in school cases throughout the Nation.

See also 105 Cong. Rec. 6485 (remarks of Sen. Carroll), 6486 (remarks of Sen. Kennedy), 6492 (remarks of Sen. Kennedy), 6725 (1959) (remarks of Sen. Goldwater); Aaron, *supra*, 73 Harv. L. Rev. at 859; Cox, *Internal Affairs*, *supra*, 58 Mich. L. Rev. at 833.[9]

As a result of the dissatisfaction with those aspects of the McClellan amendment, two days after it had been introduced and passed Senator Kuchel proposed modifications. 105 Cong. Rec. 6693 (1959).[10]

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[9] Concern was also expressed that permitting the Secretary to intervene in every dispute between members and their unions could prove harmful to union autonomy. See 105 Cong. Rec. 6726 (1959) (remarks of Sen. Kefauver):

> [S]ection 103 * * * would put the Secretary of Labor in the middle of the actions of every labor union in the United States and give him the right to institute suits at his will. It would be very difficult to carry on management-labor relations in the public interest if an unthoughtful Secretary of Labor wished to interfere.

[10] Senator Kuchel made this observation on the rapidity with which the McClellan amendment had been passed (105 Cong. Rec. 6717 (1959)):

One change was to make more specific and limited the rights secured. Instead of guaranteeing open-ended "equal rights and privileges" (*id.* at 6475), for example, the Kuchel amendment secured "equal rights and privileges * * * to nominate candidates, to vote * * *, [and] to attend membership meetings * * *, subject to reasonable rules and regulations in such organization's constitution and bylaws." *Id.* at 6693. With respect to enforcement it provided (*id.* at 6694):

> SEC. 102. Any person whose rights secured by the provisions of this title have been infringed may bring an action in a district court of the United States for such relief as may be appropriate.

The Kuchel amendment was passed the next day, on April 25, 1959 (*id.* at 6727),[11] as was the Kennedy-Ervin bill (*id.* at 6745).

> The next day, I, like many of my colleagues, read the text of the amendment offered by [Senator McClellan] for which I had voted. It was several pages long. Certainly, with more than 100 printed amendments on our desks, it was physically impossible for any of us to read, let alone to study, the amendments as, one by one, they were offered with rapidity and we were required to vote each one either up or down.
>
> Others of my colleagues on both sides of the aisle did what I did—read and studied the amendments. It became apparent that there were some obvious questions as to parts of the language used. * * * [T]here were provisions which were imperfectly drawn, which should be improved, and changed.

[11] Actually, although the Kuchel amendment was introduced on April 24, 1959, copies of it were not available to members of the Senate until the next day, when it was passed. 105 Cong. Rec. 6717.

A reading of the debates that took place during the expedited consideration of the McClellan and Kuchel amendments substantiates Professor Cox's later statement that "the work was done late at night or in little knots upon the Senate floor. The draftsmanship left much to be desired, perhaps because of the haste and stress, the number of participants, and the priority of tactical acceptability over nicety of expression." Cox, *Internal Affairs*, *supra*, 58 Mich. L. Rev. at 833. Nor did the House compensate for the Senate's haste in its passage of Title I (*ibid.*):

> The draftsman of the Landrum-Griffin bill incorporated the bill of rights passed by the Senate because its sponsors had instructed him not to write any original provisions. The Landrum-Griffin bill was approved upon the House floor without prior consideration in committee. Since there were no differences between the Senate and House bills in this respect, under parliamentary law the conferees were powerless to revise the bill of rights. Thus, these sections never received the careful technical review and clarification which comes from scrutiny by a congressional committee and its legislative staff.

See also H.R. Rep. No. 1147, 86th Cong., 1st Sess. 31 (1959).

It is most unlikely that in the flurry of activity surrounding enactment of Title I Congress meant to undermine its far more deliberate conclusion—expressed in detail in Sections 402 and 403 of the elections title (29 U.S.C. 482 and 483)—that when a court orders an election, it should be at the behest of the Secretary, and under his supervision. It is true, as the court of appeals in this case noted, that "[b]oth houses of Congress displayed extensive sup-

port for individual rights protections that were written into Title I" (Pet. App. 63a). That fact, however true, does not show that Congress authorized the courts to order and supervise elections as a remedy for conduct at nominations meetings that violates both Titles I and IV.

The relation between Titles I and IV in such cases may be discerned from an analysis of Section 402 of the House bill reprinted by Senator Goldwater after Title I was added (105 Cong. Rec. 14273 (1959)):

> *Enforcement of election requirements*
>
> Section 402(a): Before a member can go to court to upset a fraudulent election, this section requires that such member must first pursue internal union remedies for at least 6 months. This section would have operated as a bar to the court action instituted by the 13 teamsters resulting in the appointment by a Federal court of monitors to supervise that union.[12]

The action to which Senator Goldwater referred was filed in 1957 by 13 members of Teamster locals alleging a conspiracy to rig the selection of delegates to a forthcoming national Teamsters convention, disfranchisement of members, interference with freedom of expression at meetings, and similar activities that would apparently have violated both Titles I and IV of the Act passed two years later. *English* v. *Cunningham*, 269 F.2d 517, 519, 533 (D.C. Cir.), cert. denied, 361 U.S. 897, 905 (1959). The district

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[12] As we note below, pages 25-26, the House bill allowed member suits to enforce Title IV rights, though like the Senate bill it permitted new elections only under the supervision of the Secretary.

court ultimately entered a consent decree that allowed those elected to hold office provisionally, pending the conduct of new elections under the supervision of the court, assisted by a board of monitors (*id.* at 520). The court of appeals sustained the action of the district court, though as its numerous opinions on the matter indicate, implementation of the decree proved to be a complex matter.[13]

As the analysis offered by Senator Goldwater indicates, any future action seeking the remedy of a supervised election would—notwithstanding Title I—have to proceed under Title IV, beginning with the procedures for exhaustion and filing with the Secretary to which he referred. Of course, in the Teamsters' case the appointment of monitors was strictly

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[13] See *English* v. *Cunningham*, *supra*, 269 F.2d at 538 (Supplemental Opinion); *Cunningham* v. *English*, 269 F.2d 539 (D.C. Cir. 1959); *Milone* v. *English*, 282 F.2d 828 (D.C. Cir. 1960); *English* v. *Cunningham*, 282 F.2d 829 (D.C. Cir. 1960); *English* v. *Cunningham*, 282 F.2d 831 (D.C. Cir. 1960); *Milone* v. *English*, 282 F.2d 832 (D.C. Cir. 1960); *San Soucie* v. *Schmidt*, 282 F.2d 833 (D.C. Cir. 1960); *International Brotherhood of Teamsters* v. *Schmidt*, 282 F.2d 837 (D.C. Cir. 1960); *English* v. *Cunningham*, 282 F.2d 838 (D.C. Cir. 1960); *English* v. *Cunningham*, 282 F.2d 839 (D.C. Cir. 1960); *English* v. *Board of Monitors*, 282 F.2d 840 (D.C. Cir. 1960); *English* v. *Cunningham*, 282 F.2d 841 (D.C. Cir. 196); *Dorsey* v. *Cunningham*, 282 F.2d 842 (D.C. Cir. 1960); *Hoffa* v. *Letts*, 282 F.2d 842 (D.C. Cir. 1960); *English* v. *Cunningham*, 282 F.2d 848 (D.C. Cir. 1960); *Hoffa* v. *Letts*, 284 F.2d 283 (D.C. Cir. 1960).

Justice Frankfurter, in a memorandum denying an application for a stay of the court of appeals' original judgment (269 F.2d 517 (D.C. Cir. 1960)), noted:

> " ' "One thing more does need to be said.
>
> " ' "As is recognized by all concerned, judicial supervision of a union with a membership of 1,500,000 and some

speaking a post-election remedy.[14] But it is difficult to believe that a judicial solution would have been more compatible with the Act if the court had forbidden the election to take place at all, rather than provisionally accepting its results pending a judicially supervised rerun. Rather, the lesson that Congress more likely drew from the case was that "[a] court is * * * a clumsy instrument for supervising an election." *Senate Hearings*, *supra*, at 133. Senator Goldwater's statement plainly suggests, therefore, that a court-ordered and supervised election was not considered an appropriate remedy for a violation of Title I.

> 800 locals through the agency of a mechanism like the Board of Monitors is an unusual manifestation of equity powers. Defendants seek to enlarge the significance of the immediate items in controversy by their anticipation of an expansion of the powers of the Board of Monitors and their resulting fear of disruption of forces within the Teamsters as well as a heavy drain on the Teamsters' treasury in the course of such far-flung judicial administration. These are matters not immediately involved in the decree of the Court of Appeals now before me." ' "

English v. *Cunningham*, 361 U.S. 905, 909 (1959) (memorandum of Frankfurter, J.).

[14] However, Senator Goldwater's statement, if nothing else, disproves the court of appeals' conclusion in this case (Pet. App. 58a-59a) that

> The exclusiveness of the Title IV remedy in certain cases was intended to exist only vis-a-vis state remedies; there is no evidence that limitations on Title I by Title IV were ever contemplated.

Title I had been added to the bill at the time Senator Goldwater made his statement, and Senator Goldwater gave no indication that court-appointed monitors, though unacceptable under state law, were authorized by Title I.

C. The Action Of The House Reemphasizes The Senate's Conclusion That Courts Should Not Supervise Union Elections

As we mentioned above, page 21, the bill of rights provisions in Title I of the Landrum-Griffin bill were simply borrowed from the bill passed by the Senate. See Title I, H.R. 8400, 86th Cong., 1st Sess. (1959). They included a guarantee (*id.* at § 102) that "[a]ny person whose rights secured by the provisions of this title have been infringed may bring an action in a district court of the United States for such relief as may be appropriate." Similar provisions concerning Title I remedies were included in the mild reform bill sponsored by Representative Shelley of California, which was supported by the labor movement (H.R. 8490, § 102, 86th Cong., 1st Sess. (1959); Cox, *Internal Affairs*, *supra*, 58 Mich. L. Rev. at 822), and in Representative Elliott's bill, which had been reported out by the House Committee on Education and Labor (H.R. 8342, 86th Cong., 1st Sess. § 102 (1959); H.R. Rep. No. 741, 86th Cong., 1st Sess. (1959)).

With regard to Title IV's election provisions each of the House bills differed in one important respect from the Kennedy-Ervin bill. Section 402(a) of the Landrum-Griffin bill provided (H.R. 8400, *supra*, § 402(a)):

> A member of a labor organization—
>
> (1) who is aggrieved by any violation of section 401, and
>
> (2) who [has pursued internal union remedies for six months]
>
> may bring a civil action against such labor organization in any district court of the United

> States for the district having jurisdiction of such labor organization to prevent and restrain such violation and for such other relief as may be appropriate, including the holding of a new election under the supervision of the Secretary and in accordance with the provisions of this title.

Identical provisions were included in the Shelley bill (H.R. 8490, *supra*, § 402(a)) and the Elliott bill (H.R. 8342, *supra*, § 402(a)). The idea behind permitting members, rather than the Secretary, to initiate Title IV suits may have been that "the losing faction in an election could conduct its contest more expeditiously by hiring aggressive local counsel than by undertaking a trek to Washington * * *." H.R. Rep. No. 741, *supra*, at 79 (Supplementary Views on H.R. 8342).

What is significant, though, is that each of the three bills seriously considered by the House provided for secretarial supervision of court-ordered elections *even in actions filed by union members.* That requirement undoubtedly derived from a feeling that whatever advantages private enforcement might have, a court would still be poorly equipped to conduct an election. Moreover, the absence of a similar provision for secretarial supervision in the enforcement sections of Title I (H.R. 8342, *supra*, § 102; H.R. 8400, *supra*, § 102; H.R. 8490, *supra*, § 102) is a strong indication that the House did not consider court-ordered elections to be "appropriate" relief for Title I violations.[16]

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[16] The provision for member suits to enforce Title IV election rights in the Landrum-Griffin bill was deleted in conference, and the Kennedy-Ervin provision for secretarial enforcement was substituted. H.R. Rep. No. 1147, 86th Cong., 1st

II. THE TERMS OF THE ACT SHOW THAT CONGRESS, OUT OF CONCERN FOR UNION SELF-GOVERNMENT, INTENDED TO PRECLUDE COURTS FROM ORDERING AND SUPERVISING ELECTIONS TO REMEDY TITLE I VIOLATIONS

The legislative history of the LMRDA makes clear that Congress had little confidence in the courts' ability to conduct union elections. The language of the Act demonstrates Congress's correlative conviction that the election process was crucial to union self-government. Although Title I, and especially Title IV, were intended to make unions more democratic, both titles also respect the link between elections and self-government. Title I guarantees a broad spectrum of rights to ensure the individual member's participation in his union's affairs, but limits available remedies to those that are "appropriate." Title IV shows a concern that elections be regular and periodic, and not easily overturned. When it is necessary to interfere in the election process, Title IV installs the Secretary as a buffer, and also commits to him the supervision of any court-ordered election. Though a court may afford some relief on its own

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Sess. 35 (1959). The conference report does not explain the reason why the House receded. It was no doubt felt, however, as Senator Goldwater said in comparing the House and Senate versions (105 Cong. Rec. 16489 (1959)), that

> the Senate bill is substantively preferable in its reliance on Government, rather than exclusively individual, enforcement action. Since the election standards are designed to insure honest elections for the benefit of all union members as a matter of public policy, their violation is a matter of public rather than exclusively individual concern, and should be enforcible in the same way as the trusteeship standards of the bill.

"prior to the conduct" of an election, Title IV's remedies are otherwise exclusive. When a court orders a new judicially supervised election as the district court did here, it not only undertakes a task for which it is ill-equipped, but also ignores the Act's structural protection of union self-government.

Title I of the LMRDA is a bill of rights, only some of which are directly relevant to officer elections. It assures members equal rights "to nominate candidates, to vote in elections [for choosing officers and for other purposes] * * *, [and] to attend membership meetings"—including those at which elections occur—"subject to reasonable rules and regulations" set by the union. 29 U.S.C. 411(a)(1). It also guarantees each member the freedom "to express * * * his views[] upon candidates in an election" (29 U.S.C. 411(a)(2)). But the right to participate in union affairs and the freedoms of speech and assembly have numerous other applications. And Title I also deals with the rights to sue and to appear as a witness or communicate with the legislature, the right to specified procedures for increasing dues or imposing other assessments, and the right to notice and a fair hearing if the union seeks to impose any form of discipline. 29 U.S.C. 411(a)(3)-(5). Title I states in addition that if the various rights it secures are infringed, an individual member may sue in federal district court "for such relief (including injunctions) as may be appropriate." 29 U.S.C. 412.

Title IV, by contrast, is entitled "Elections" and is exclusively concerned with the election process. Like Title I it guarantees a number of individual rights, though here they are both more specific and more unqualified. An opportunity must be provided

for the nomination of candidates. Every member in good standing is declared eligible (subject to uniform and reasonable qualifications) to be a candidate; each is given the right to vote or otherwise support the candidate of his choice, and to 15 days' notice of the election. Votes are to be weighted equally, and members whose dues are withheld by an employer cannot be disqualified for nonpayment of dues. 29 U.S.C. 481(e). Candidates are entitled to the union's assistance in distributing campaign literature and are given the rights to inspect membership lists and to have observers at the polls and at the counting of the ballots. 29 U.S.C. 481(c). These rights encompass the kinds of claims made by respondents in this case: the opportunity to nominate candidates, the right to be a candidate, and the right to support the candidate of one's choice. See, *e.g.*, *Wirtz* v. *National Maritime Union of America*, 399 F.2d 544, 548-549 (2d Cir. 1968).

In addition to protecting those individual rights, however, Title IV includes structural provisions designed to assure that unions—through their elections—remain *self*-governing organizations. Elections must be held at regular intervals—in the case of a local like petitioner "not less often than once every three years by secret ballot among the members in good standing." 29 U.S.C. 481(b). See also 29 U.S.C. 481(a) and (d). The regularity of that process cannot be automatically upset by election challenges. Rather, a "challenged election shall be presumed valid pending a final decision thereon" (29 U.S.C. 482(a)). The thought was that

> union business must not be brought to a standstill whenever an election is challenged * * *. The choice lies between keeping the old officers

> in office and allowing the new officers to govern even though their right is challenged. The latter course appears preferable for several reasons. A union election should be presumed valid until the contrary appears. The newly elected officers would be more likely to have the support of the members. There would be less disruption of normal procedure within the union.

Cox, *The Role of Law in Preserving Union Democracy*, 72 Harv. L. Rev. 609, 634 (1959) ("Cox, *The Role of Law*"). Moreover, an order directing the conduct of a new election is immediately appealable, though to avoid prolonging any uncertainty such orders may not be stayed pending appeal. 29 U.S.C. 482(d).

There are still other hurdles, both procedural and substantive, that prevent courts from upsetting the regular election process. Members may not file their own suits to correct Title IV violations,[16] but can only ask the Secretary to do so—and then only after exhausting internal remedies, or at least pursuing them for three months. 29 U.S.C. 482(a). As Professor Cox testified concerning this requirement, it "preserves a maximum amount of independence and self-government by giving every international union the opportunity to correct improper local elections." *Senate Hearings*, *supra*, at 134. The Secretary, in turn, will bring an action only "if he finds probable cause to believe that a violation * * * has occurred and has not been remedied" (29 U.S.C. 482(b)). See S. Rep. No. 187, *supra*, at 21 ("an election is not to be set aside for technical violations"). Even then,

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[16] An exception to this general rule is provided for enforcing the right to distribution of campaign literature. 29 U.S.C. 481(c).

the court may not "declare the election * * * to be void and direct the conduct of a new election" unless "after a trial upon the merits" [17] it finds that the violation "may have affected the outcome of an election" (29 U.S.C. 482(c)). See *Wirtz* v. *Hotel Employees*, 391 U.S. 492, 505-509 (1968).

Title IV also responds directly to Congress's concern that courts are ill suited to conduct elections. It states that any new election must be "under supervision of the Secretary" (29 U.S.C. 482(c)). Once the election has been held the Secretary "certif[ies] to the court the names of the persons elected, and the court shall thereupon enter a decree declaring such persons to be the officers of the labor organization" (*ibid.*).

Congress not only prescribed detailed procedures to administer the remedy it selected for Title IV violations, but also restricted the availability of other remedies for election violations. Section 403 (29 U.S.C. 483) provides:

> No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by this [title]. Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this

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[17] The requirement that the court make its findings only after a trial on the merits, though it does not preclude the granting of summary judgment, see *Brennan* v. *Local No. 639*, 494 F.2d 1092, 1094-1098 (D.C. Cir. 1974), obviously forbids preliminary injunctive relief invalidating an election.

> [title]. The remedy provided by this [title] for challenging an election already conducted shall be exclusive.

The first sentence of Section 403 means that the union constitution and bylaws govern officer elections so long as they conform to Title IV; any other law purporting to impose different requirements is preempted. In the second sentence Congress preserved some existing rights and remedies—those to enforce the constitution and by-laws—so long as they are invoked prior to the conduct of an election. The third sentence declares that when an election is already conducted, *all* "remed[ies] * * * for challenging an election" other than Title IV proceedings are foreclosed, even those that merely seek to correct violations that took place "prior to the conduct" of the election.

As this case demonstrates, some conduct that violates Title IV may also violate Title I. To recognize that is not to acknowledge, however, that a court-ordered and supervised election is an appropriate remedy for such a Title I violation. As we have shown, Title IV prescribes a remedy for election violations that is carefully designed to interfere as little as possible with union self-government. Title I, by contrast, merely authorizes a court to redress violations of the various rights provided in that portion of the statute by affording "such relief (including injunctions) as may be appropriate." 29 U.S.C. 412. But as this Court has frequently emphasized, a statute must be read as a whole, giving effect to all its parts. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979); *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633-634 (1973); *Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303, 307-308 (1961).

The very use of the term "appropriate" in Title I suggests that certain remedies are inappropriate. The scope of the "appropriate" remedy under Title I must be defined with an awareness of the important end served by the more specific procedures in Title IV. The district court's action in this case chips away at the protection for union self-government given by Title IV in numerous ways. For example, although Section 401(b) (29 U.S.C. 481(b)) guarantees local elections every three years, the temporary restraining order and preliminary injunction issued here delayed the Local's triennial election an entire year beyond its appointed time. And although Section 402(a) (29 U.S.C. 482(a)) directs that newly elected officers should assume office even though their right is challenged—since they "would be more likely to have the support of the members" than the incumbents (Cox, *The Role of Law*, *supra*, 72 Harv. L. Rev. at 634)—the court's intervention made that impossible. New elections under Title I may also conflict with the direction of Section 402(c) (29 U.S.C. 482(c)) that the regular election process not be upset to remedy violations that could not have affected the outcome. Although refusal to recognize a nomination would be cause for ordering a new election under Title IV, see *Wirtz* v. *Hotel Employees*, *supra*, 391 U.S. at 507, the same may not be true of all election-related misconduct that a court might seek to redress by ordering a new election under Title I.

A fourth way in which self-government would be promoted under Title IV concerns the exhaustion of intra-union remedies. Section 402(a) (29 U.S.C. 482(a)) makes exhaustion a prerequisite to filing a complaint with the Secretary under Title IV. By

contrast, although exhaustion of Title I claims may be demanded by the union, 29 U.S.C. 411(a)(4), this Court has held that the necessity of complying is a matter left to the discretion of the district court. *NLRB* v. *Marine Workers*, 391 U.S. 418, 426-428 (1968). In this case, a hearing to review the conduct of the nominations meeting, undertaken by Teamsters Joint Council 10, was cancelled when this action was filed (Pet. App. 15a-16a). Still another difference may be found in Title IV's requirement that a court may not order a new election except "after a trial upon the merits" (29 U.S.C. 482(c)). Because no similar limitation is found in Title I, courts may upset the regular election process more freely—as the district court did here—on the basis of the necessarily less certain evidence offered in support of a motion for a preliminary injunction.

Yet another divergence from Title IV's procedures, and one of more intimate concern to Congress, is that judicial elections under Title I take place without the Secretary's supervision. 29 U.S.C. 482(c). But a "court has no tellers, watchers, or similar officials. It would become mired in the details of the electoral process. To appoint a master to supervise the election would delegate the responsibility, but the master would face many of the same problems as the judge." *Senate Hearings*, *supra*, at 133-134. Ultimately, there is no substitute for the expertise the Secretary has acquired, and the resources he can bring to the task. As this Court emphasized in *Calhoon* v. *Harvey*, 379 U.S. 134, 140 (1964):

> Reliance on the discretion of the Secretary is in harmony with the general congressional policy to allow unions great latitude in resolving their own internal controversies, and, where that

fails, to utilize the agencies of Government most familiar with union problems to aid in bringing about a settlement through discussion before the resort to the courts.

Those many departures from the detailed scheme created by Title IV emphasize the point made in the "exclusive remedy" provision, Section 403 (29 U.S.C. 483). One might wish that Congress had spoken with more precision in the second and third sentences, whose language (about remedies "prior to the conduct" of an election, and remedies "for challenging an election already conducted") does not apply neatly to mail ballot elections. But it is clear that this case has escaped an unequivocal clash with Section 403 only because the district court issued a temporary restraining order less than 17 hours before the ballots were to have been counted. The sensitive remedial process created in Title IV should not be bypassed on the basis of such hasty judicial action.

III. THIS COURT'S DECISIONS HAVE RECOGNIZED THAT THE PURPOSES OF THE ACT WOULD BE FRUSTRATED IF COURTS WERE PERMITTED TO REMEDY TITLE I VIOLATIONS BY ORDERING AND SUPERVISING ELECTIONS

Although this Court has not until now been required to reconcile the remedies provided under Titles I and IV of the Act, its prior decisions have frequently acknowledged the two relevant principles that emerge with such clarity from the legislative history and the terms of the Act. The first is that the Secretary has an expertise, which the courts lack, in overseeing union elections. The second is that unions should be—to the maximum extent pos-

sible consistent with protecting individual members' rights—self-governing institutions. From those two principles flow a number of subsidiary objectives that this Court has also found in the Act: centralizing litigation about election violations in the Secretary's hands, insulating unions from insubstantial complaints and from litigation on multiple fronts, and avoiding the delay created by protracted litigation over elections. By taking control of the election process the district court ignored those principles and objectives.

1. In *Calhoon* v. *Harvey, supra*, this Court rejected an attempt by union members to enjoin an upcoming election because of alleged violations of Title I. The plaintiffs there claimed that restrictions on who was eligible to be a candidate, in combination with a rule permitting only self-nominations, violated their Title I right "to nominate candidates." Relying in part on the express language of Section 101(a)(1) (29 U.S.C. 411(a)(1)), the Court held that Title I protects only the "equal" right to nominate and thus was not violated by the union's rule absent a claim of discriminatory application.

Assuming the rule may have violated Title IV, the Court went on to stress the undesirability of correcting such violations by pre-election actions for injunctive relief. The Court noted that Congress had consciously chosen, with regard to union elections,

> to utilize the special knowledge and discretion of the Secretary of Labor in order best to serve the public interest. In so doing Congress * * * decided not to permit individuals to block or delay union elections by filing federal-court suits for violations of Title IV. Reliance on the discretion of the Secretary is in harmony with the

> general congressional policy to allow unions great latitude in resolving their own internal controversies, and, where that fails, to utilize the agencies of Government most familiar with union problems to aid in bringing about a settlement through discussion before resort to the courts.

379 U.S. at 140 (citation and footnote omitted).

Those views were reaffirmed in *Wirtz* v. *Glass Bottle Blowers Ass'n*, 389 U.S. 463 (1968), which held that an intervening regularly scheduled election does not moot the Secretary's action for a remedial election under Title IV. That conclusion, the Court found, necessarily followed from both of the principles discussed above. In the first place, Congress's desire "to preserve a 'maximum amount of independence and self-government by giving every international union the opportunity to correct improper local elections' " (389 U.S. at 472-473, quoting S. Rep. No. 187, *supra*, at 21) meant that a final decision in court would often be overtaken by a subsequent election.[18] It would be ironic if Congress's very devotion to the goal of union self-government should have the effect of excusing a union that was unable to clean its own house before the next election. Moreover, once a violation had been shown, there was no substitute for "the protective

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[18] Other decisions as well have recognized the policy behind the exhaustion requirement. *Wirtz* v. *Laborers' Union*, 389 U.S. 477, 484 (1968) ("the exhaustion requirement was regarded by Congress as critical to the statute's objective of fostering union self-government"); *Hodgson* v. *Steelworkers*, 403 U.S. 333, 339 (1971) ("Congress intended to foster a situation in which the unions themselves could remedy as many election violations as possible without the Government's ever becoming involved").

presence of a neutral Secretary of Labor [to] prevent the unfairness in the first election from infecting, directly or indirectly, the remedial election." 389 U.S. at 474.

The same emphasis on union self-government and the importance of the Secretary's role shaped the decision in *Trbovich* v. *United Mine Workers of America, supra.* The Court there held that a member complaining under Title IV could be allowed to intervene in an action brought by the Secretary, though he would not be permitted to raise points rejected by the Secretary for setting aside an election. The Court found that the Act carried out Congress's "interest in minimizing judicial interference with union elections." 404 U.S. at 533. To that end (*id.* at 532):

> Congress made suit by the Secretary the exclusive post-election remedy for two principal reasons: (1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections, and (2) to centralize in a single proceeding such litigation as might be warranted with respect to a single election.

Allowing member intervention would frustrate neither of those objectives. On the other hand, permitting the intervenor to raise new issues would "circumvent the screening function assigned by statute to the Secretary." 404 U.S. at 537.

Finally, the Court once again emphasized the "special knowledge and discretion of the Secretary" and the disruptive effect of delay on union self-government in severely restricting judicial review of the Secretary's decision not to bring suit under Title IV. *Dunlop* v. *Bachowski*, 421 U.S. 560, 571, 573 (1975). In the course of its decision, the Court noted (*id.* at 566):

Certain LMRDA provisions concerning pre-election conduct, 29 U.S.C. §§ 411-413 and 481(c), are enforceable in suits brought by individual union members. Provisions concerning the conduct of the election itself, however, may be enforced only according to the post-election procedures specified in 29 U.S.C. § 482.

2. A district court order that delays a scheduled election for an entire year, and then directs the conduct of a new election under court supervision, frustrates all of those principles and objectives. As we have already noted at some length, it dispenses entirely with the Secretary's expertise and resources for supervising new elections. See pages 17, 30, 34-35, *supra*. That process requires a court to make decisions about the date of the election; the time and method of giving notice; eligibility requirements for attendance at the nominations meeting, for making nominations, and for running for office; distribution of campaign literature; the method of casting ballots and the procedure for overseeing the tally; and a number of other details. See Pet. App. 86a-93a. It may also necessitate numerous decisions on contested claims of eligibility, which will turn not only on factual questions, but also on the interpretation of the union's constitution and bylaws, customs and practices (*id.* at 89a-91a).

By entertaining election challenges under Title I a court not only sacrifices the Secretary's expertise in *supervising* elections, but also foregoes the benefit of the Secretary's decision about *whether to seek* the conduct of a new election. As this Court emphasized in *Dunlop* v. *Bachowski*, *supra*, 421 U.S. at 571, Congress in Title IV expressed its view that the Secretary was better able to make that decision than a court:

> [S]ince the statute relies upon the special knowledge and discretion of the Secretary for the determination of both the probable violation and the probable effect, clearly the reviewing court is not authorized to substitute its judgment for the decision of the Secretary not to bring suit * * *.

Moreover, the Secretary's authority to seek correction of violations is less confined than that of a court acting simply on a member's Title I complaint. Some election violations will be unlawful only under Title IV, and therefore not remediable by a court acting under Title I. See *Calhoon* v. *Harvey*, *supra*. In this case, for example, the district court dismissed one of respondent's claims—that the union's rule conditioning eligibility on timely payment of dues was an unreasonable qualification (Pet. App. 7a-8a, 12a-13a)—because the facts alleged stated a violation only of Title IV.

The district court's direction of a new election under Title I not only ignores the statutory role of the Secretary, but also interferes to an impermissible degree with the principle of union self-government embodied in the Act. As we have already noted (page 30, *supra*), "the exhaustion requirement [in Title IV] was regarded by Congress as critical to the statute's objective of fostering union self-government." *Wirtz* v. *Laborers' Union*, 389 U.S. 477, 484 (1968). That objective is ill-served by applying the more relaxed exhaustion requirements of Title I (see pages 33-34, *supra*) to requests for a new election. The same principles of union autonomy persuaded Congress "not to permit individuals to block or delay union elections by filing federal-court suits for violations of Title IV." *Calhoon* v. *Harvey*, *supra*, 379 U.S. at 140. But again, as we have already noted,

court intervention in this case resulted in delaying a union election for an entire year beyond the three-year maximum fixed by Title IV (29 U.S.C. 481(b)), and retaining in office incumbents whose claim on the members' allegiance may be weaker than that of the 1980 election winners, whatever the defects of that election may have been.

The principle of union autonomy is also seriously compromised when a court ignores the Secretary's ability "to centralize in a single proceeding such litigation as might be warranted with respect to a single election." *Trbovich* v. *United Mine Workers of America*, *supra*, 404 U.S. at 532. As Professor Cox noted during the Senate hearings, "An election is an integer. Its validity should be adjudicated once and for all in one forum." *Senate Hearings*, *supra*, at 135. That purpose is served by Title IV because all the reins are collected in the Secretary's hands. But there is no limit to the number of Title I actions that may be filed to challenge the election process. And the venue provision in Section 102 permits such suits to be filed "where the alleged violation occurred, or where the principal office of such labor organization is located" (29 U.S.C. 412). It is thus conceivable that several suits requesting a remedial election could proceed in different courts at the same time, and come to different conclusions about whether or how to conduct a new election. Cf. *Carter* v. *Civil Service Employees Association*, No. CV-80-0832 (E.D.N.Y., filed Mar. 26, 1982) (Title I); *Donovan* v. *Civil Service Employees Ass'n*, No. 83-CV-108 (N.D.N.Y., filed Jan. 31, 1983) (Title IV). That possibility alone makes it unlikely that the "appropriate" relief authorized by Section 102 for Title I violations was intended to include court-ordered elections.

3. The reasons advanced by the court of appeals to justify judicially ordered and supervised elections under Title I will not withstand careful examination. The court suggested that "[t]he rights protected by Title I, particularly equal rights to participate in union elections, free speech, and due process, * * * are in the nature of rights traditionally protected by federal courts" (Pet. App. 59a). However true that may be as an abstract matter, it is also true that the rights asserted here—to nominate, to run for office, to vote—are precisely the kinds of rights guaranteed by Title IV. 29 U.S.C. 481(e). And Congress in Title IV

> relie[d] upon the special knowledge and discretion of the Secretary for the determination of both the probable violation and the probable effect * * *.

Dunlop v. *Bachowski*, *supra*, 421 U.S. at 571. More important, whatever the nature of the rights a member seeks to enforce, there is an undeniable difference in the respective competencies of the courts and the Secretary to conduct a supervised election as a remedy. And what is at issue in this case is simply the propriety under the Act of a district court (acting as a court of equity) affording immediate pre-election injunctive relief, rather than waiting 17 hours to follow the remedial structure prescribed by Title IV. Congress's clearly expressed desire to utilize the special competence of the Secretary, and to respect to the maximum extent possible the union's autonomy, leaves no uncertainty about the answer to that question.

The court of appeals also suggested that "suits involving Title I rights will produce individual fact patterns, and, even if several suits are brought, conflicting or redundant rulings are not likely to emerge,

and unions will not be burdened unfairly by litigation" (Pet. App. 59a-60a). There is little support for that claim apart from the court's ipse dixit. LMRDA election violations will always involve "individual fact patterns," because rights are inherently individual claims. Title IV's guarantees concerning the opportunity to nominate candidates, the right to run for office, the right to vote, the right to pre-election notice, the right to have one's vote counted equally, and the right of one whose dues are withheld by an employer not to be declared ineligible (29 U.S.C. 481(e)) all protect individuals. Yet Congress directed that they should be enforced only by the Secretary, because the Title IV remedy for individual violations—a new election—affects the entire union. The same is true when a court orders a new election to remedy Title I violations. If "several suits are brought, conflicting or redundant rulings" (Pet. App. 59a) about whether and how to conduct a new election may well emerge, and the effect on the collective interest in union self-government could well be chaotic.

In finding that its action was not foreclosed by the exclusivity provision in Section 403 (29 U.S.C. 483), the court of appeals concluded that "flagrant violations [of Title I] may go unremedied" if courts are precluded from acting on complaints during the election process (Pet. App. 65a). That conclusion both exaggerates the problem and ignores the explicit language of the Act. Section 403 does say that "[t]he remedy provided by [Title IV] for challenging an election already conducted shall be exclusive." And when that point is reached,[19] a Title I claim that

[19] The Secretary believes, contrary to the court of appeals, that that point is reached no later than when the tally of the

amounts to an election challenge may not be entertained by a court.[20] But relief is still available for the same conduct under Title IV. And up to the point when an election is "already conducted" Section 403 explicitly preserves "[e]xisting rights and remedies to enforce the constitution and bylaws," and implicitly permits Title I actions for "appropriate" relief (see 29 U.S.C. 412). Such relief would include actions for damages. It would also encompass equitable remedies that did not result in delay or judicial supervision of the election process. See Note, *Union Elections and the LMRDA: Thirteen Years of Use and Abuse*, 81 Yale L.J. 407, 558-559 (1972); Comment, *Titles I & IV of the LMRDA: A Resolution of the Conflict of Remedies*, 42 U. Chi. L. Rev. 166, 179 (1974); James, *Union Democracy and the LMRDA: Autocracy and Insurgency in National Union Elections*, 13 Harv. C.R.-C.L. L. Rev. 247, 316-317

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ballots is begun. Cutting off all individual challenges at that point prevents candidates who may be losing from using the courts to sandbag the election. More important, the Secretary's post-election action will be free from interference by individual members' suits.

There have been cases that have erroneously granted Title I relief after the election was over. See, *e.g.*, *Kupau* v. *Yamamoto*, 622 F.2d 449 (9th Cir. 1980); *Kraska* v. *United Mine Workers of America*, 686 F.2d 202 (3d Cir. 1982). Even in those cases, however, the relief granted was the installation in office of the winning candidates, not the conduct of a new election.

[20] That does not necessarily mean that all post-election Title I claims are precluded. For example, discriminatory denial of a vote to one member that did not affect the outcome of an election would not be remediable under Title IV. In that case the claim is not that the election is invalid, but that an individual's right has been violated, and a Title I suit for damages may be appropriate.

(1978).[21] But the "appropriate" relief contemplated by Title I does not include an injunction that delays for an entire year a union's regularly scheduled election and that directs the conduct of a new election under the supervision of a court, unassisted by the Secretary.

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[21] Respondents have suggested, without supporting argument, that "this action will be wholly moot before this Court is likely to decide the merits" of the case (Br. in Opp. 25). That suggestion is without merit. The district court has impounded and still holds the ballots for the 1980 election, which it enjoined, and the term of the offices voted on in that election has not yet expired. It is true that the next regularly scheduled election will occur before the end of 1983, and we are informed that the officers chosen at that election will be installed by the beginning of 1984. But as this Court held in *Wirtz* v. *Bottle Blowers' Ass'n*, *supra*, 389 U.S. at 468-476, the intervention of a regularly scheduled election does not cut off the Secretary's right to exercise his statutory authority with regard to the preceding election.

More important, the underlying order being reviewed here is only a preliminary injunction. The district court has retained jurisdiction over the case, and as the court of appeals noted, "the district court did * * * not regard [the preliminary injunction] as the final order in this case" (Pet. App. 76a). In papers recently filed with the district court respondents suggested that further action by the court might be "necessary to guarantee fair and open elections in the union" even after the 1983 election. Unless "the Defendant Griffiths is replaced in that election," respondents suggested that they might have "reason to believe [that] further injunctive relief is necessary * * *." Plaintiffs' Supplemental Memorandum In Support Of Their Modified Motion For An Award Of Attorneys Fees 4. (We have lodged a copy of the Memorandum, along with a Proposed Contempt Judgment And Order for violation of the preliminary injunction, with the Clerk of this Court.)

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with instructions to vacate the preliminary injunction and return the ballots to the custody of petitioners.

Respectfully submitted.

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No. 82-432

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LOCAL NO. 82, FURNITURE AND PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN, AND PACKERS; BART GRIFFITHS, SECRETARY-TREASURER, LOCAL NO. 82; GEORGE HARRIS, PRESIDENT, LOCAL NO. 82; PHILLIP PIEMONTESE, CHAIRMAN OF THE ELECTION COMMITTEE OF LOCAL NO. 82; and JOHN DOE, JAMES DOE and JEROME DOE, MEMBERS OF THE ELECTION COMMITTEE OF LOCAL NO. 82,

Petitioners,

RAYMOND DONOVAN, SECRETARY OF LABOR,

Intervenor,

v.

JEROME CROWLEY, ANTHONY COYNE, JOSEPH FAHEY, ROBERT LUNNIN, JAMES HAYES, GERALD OWENS, JOHN LYNCH, JOSEPH TRASK, JOSEPH MONTAGNA, and DENNIS BATES,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITIONERS' REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-432

LOCAL NO. 82, FURNITURE AND PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN, AND PACKERS, *et al.*,
Petitioners,

RAYMOND DONOVAN, SECRETARY OF LABOR,
Intervenor,

v.

JEROME CROWLEY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITIONERS' REPLY BRIEF

INTRODUCTION

The issues presented by this case require a determination of the parameters of a district court's authority under Section 102 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 412, to remedy alleged violations of Title I of the Act occurring in the context of a union's election of officers which, but for the mechanistic task of tabulating the ballots, has been completed. Petitioners have argued that a district court exceeds its statutory authority under Title I by ordering relief which nullifies ballots cast in an election, imposes

rules on the union to be utilized in a rerun election, and appoints third parties not associated with the union to conduct the election under the court's supervision. Additionally, Petitioners maintain that in this case the election had been "already conducted" at the time an injunction was issued preventing tabulation of the ballots, and, therefore, challenges to the election were subject to the exclusive jurisdiction of the Secretary of Labor pursuant to § 403 of the Act.[1] 29 U.S.C. § 483.

Respondents seek to avoid consideration of these issues by suggesting the absence of an active case or controversy. Petitioners will address those arguments before discussing the case on the merits.

I. THE MATTER BEFORE THE COURT PRESENTS A LIVE CASE OR CONTROVERSY

A. The "Stipulations"

Respondents assert that the election of officers conducted by Local 82 in December, 1980 was nullified by the Union's[2] effort to settle the case by offering to conduct a new election of officers and that there is no active case or controversy between the parties (Resp. Br. at 23, 25).[3] But to terminate a case, there must be a "settlement be-

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[1] Petitioners have not argued that a district court *never* has jurisdiction to consider Title I complaints in the context of a union election of officers. Rather, Petitioners have challenged the district court's jurisdiction to grant the type of relief ordered in this case. Thus, most of the arguments presented by the Association for Union Democracy as *amicus* in support of Respondents and advocating reconsideration of this Court's decision in *Calhoon* v. *Harvey*, 379 U.S. 134 (1964), do not deal with the questions before the Court.

[2] Petitioners-Defendants will be referred to collectively as the "Union." Respondents are referred to as such or as "Plaintiffs."

[3] The argument was presented to, and rejected by, the court of appeals. "We emphasize, however, that we do not uphold the injunction on the theory that defendants were bound by their stipulations." (Pet. App. B at 78a).

tween the parties of every material controversy which the record presented." *Buck's Stove & Range* v. *Amer. Fed. of Labor*, 219 U.S. 531 (1911).

As the court of appeals recognized, the Union's offer to conduct a new election was never converted into a "stipulation," (Pet. App. B at 72a n.22), since there was never an agreement between the parties or mutual assent.[4] *United States* v. *Hall*, 424 F. Supp. 508, 547 (W.D. Okl. 1975), *aff'd*, 536 F.2d 313, 323 (10th Cir.), *cert. denied*, 429 U.S. 919 (1976); *United States* v. *Harris*, 542 F.2d 1283, 1297 (7th Cir. 1976), *cert. denied*, 430 U.S. 934 (1977); *U.S.* v. *Three Winchester*, 504 F.2d 1288, 1290 (7th Cir. 1980). When the proposal to conduct a new election was offered in court on January 9, 1981, it was rejected by the Plaintiffs.[5]

At the court's insistance (R. 458-59, 471-72), a week was spent exploring the possibilities of a settlement, after which Plaintiffs' counsel reported to the court on January 15, 1981 that "there is no agreement per se at this point" (JA 101).[6] Contrary to Respondents' repeated unsupported assertions in their Brief, there was never an agreement between the parties on the Union's election

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[4] "Unless it is clear from the record that the parties assented, there is no stipulation . . . ." 73 Am. Jur. 2d, Stipulations § 2.

[5] Plaintiffs' counsel contended the offer was "lacking in several respects . . ." (R. 451); did not alter the Union's disputed candidate-eligibility rules (R. 452); and would not be acceptable unless incorporated into a court order (R. 453). Counsel further advised the court that Plaintiffs would never be able to agree with the Union over key election procedures (R. 473-74). Further disagreement arose over the incorporation of any stipulation into a court order (R. 460-61). Both parties recognized the "stipulations" as an alternative to a court-ordered election, as did the court (R. 495-96).

[6] Indeed, counsel advised the court that he objected "to the entirety" of the Union's proposal (R. 507).

proposal and, thus, was never a "stipulation" for the court to accept[7] (Resp. Br. at 23, 25). The most apparent evidence in support of the Union's position is the existence of the court's order, since the court advised the parties that no order would issue to cover "stipulated" matters (R. 509).

The hearings which led to the preliminary injunction of July 13, 1981 were conducted because the Union's proposal had not been accepted (JA 101-02, 06). The Union repeatedly challenged the court's authority to modify that proposal or to incorporate it into a court order requiring a new election.[8] And the court reassured

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[7] This is not the only liberty taken by Respondents in presenting their version of the case. The record does not support their claim that the Union declared the 1980 election to be null and void (Resp. Br. at 15, 23, 25). The court never granted the Union leave to declare the ballots cast in the 1980 election to be null and void (Resp. Br. at 9). In fact, the Union never made such a request or declaration. Respondents' approach to the record is best exemplified by their footnotes 2 and 4 (pages 4-7 and 9, respectively). In note 2, they misrepresent Mrs. Noonan's response to a statement of the court by omitting an interposed statement of the court to which Mrs. Noonan was responding. (*See*, R. 462-63 for complete statements of the court and counsel). In note 4, Respondents cite two statements in a manner which suggests they were made contemporaneously and constitute the Union's consent to the court's imposition of non-Union supervisors to conduct the election. Yet, the statements were made at hearings conducted on January 23 and March 6, 1981 and the latter statement was preceded by Union counsel's repetition of the contention "that the Court does not have the authority to dictate the terms of the election" and counsel's admonition that "it would be a gross misrepresentation . . . [for the court to] conclude from our silence that we were finding acceptable either the third party that Mr. Stern comes up with or the special master [selected by the court]." (JA 104, 112).

[8] R. 66-70, 460-61; JA 106, 110, 112. The district court often expressed its conviction that it had authority to order election terms if the parties failed to agree to stipulated procedures (JA 101; R. 500, 508). The court of appeals noted the Union's continuing objections to the district court's authority with regard to these issues (Pet. App. B at 73a).

the Union that its participation in the negotiations over the terms of the new election would not "waive your basic exception to the Court's ordering [a new election] . . ." (JA 111-12).[9] Nor can the Union's compliance with the district court's injunction be interpreted as waiving the Union's objection to the court's authority to order the new election. *Bakery Sales Drivers Union* v. *Wagshal*, 333 U.S. 437 (1948).

All parties recognized that the court's decision to order an election raised significant jurisdictional questions (JA 101-02, 110; R. 558). It is those questions which are pending before this Court. And in their application for attorney fees, Respondents recognize that the relief obtained was by court order, not the consent of the Union (Pet. Br. App. at 2a-5a). This Court, as did the court of appeals, has rejected Respondents' previously offered contention that the case is moot because of the "stipulations" and it is apparent that there has never been a "settlement between the parties of every material controversy which the record presented." [10]

B. The Case Is Not Presently, Nor Is It About To Become, Moot

Respondents allege that the case is justiciable only to the extent that the officers elected as a result of the court-ordered 1981 election remain in office. They contend that

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[9] The district court rejected Plaintiffs' contention that the Union, by offering its proposal, conceded that the court had jurisdiction to rerun the election (R. 491).

[10] Only two of the cases cited by Respondents in the first section of their brief purportedly support their proposition regarding the "stipulations." *Donovan* v. *Penn Shipping Co., Inc.*, 429 U.S. 648 (1977), involved an attempt to appeal after plaintiff accepted a remittitur in lieu of a new trial, a situation not similar to the facts of this case. *Marviraxon Companía, Etc.* v. *H.J. Baker & Bros.*, 674 F.2d 364 (5th Cir. 1982), neither stands for the proposition cited nor discusses any issue relevant to this case.

this Court will be unable to grant the requested relief once the Union's next election of officers is held (Resp. Br. at 28-29 and n.13). Respondents offer no authority to support these positions, and, in fact, the cases are to the contrary.

1. *An Intervening Election Will Not Moot The Issues Before The Court*

The Union has requested this Court to nullify the results of the court-ordered 1981 election and to permit it to retrieve and count the ballots cast in the 1980 election. Thereafter, any member would be entitled to pursue the remedies available under Section 402 of the Act, 29 U.S.C. § 482, to challenge the validity of that election. While Respondents apparently challenge the Court's authority to grant such relief once the 1983 election has been conducted, this Court has held that an intervening election deprives neither the Secretary of Labor of the authority to challenge a prior election nor a court of its jurisdiction to consider such a challenge. *Wirtz* v. *Glass Bottle Blowers*, 389 U.S. 463 (1968); *Wirtz* v. *Local Union No. 125*, 389 U.S. 477 (1968).[11]

Respondents misanalyze the import of these cases, (Resp. Br. at 30 n.14), and their unsupported claim that the Secretary could not exercise any authority with respect to the 1980 election if this Court nullifies the 1981 election is simply not correct. *Cf.*, *Dunlop* v. *Bachowski*, 421 U.S. 560, 575-76 (1975). It is submitted that Respondents' claim that the district court's impropriety can be washed away by the happenstance intervention of an unsupervised election is as incorrect as the contention rejected in *Glass Bottle Blowers*. 398 U.S. at 474.

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[11] This Court has applied the *Glass Bottle Blowers'* rationale to reject claims of mootness based upon the modification of a bylaw provision challenged in a suit by the Secretary of Labor. *Wirtz* v. *Hotel Employees Union*, 391 U.S. 492, 500 n.9 (1968).

These cases also are relevant to Respondents' contention that an intervening event can moot the case. In *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979), this Court held that an intervening event will not moot a case unless it has "irrevocably eradicated the effects of the alleged violation." Yet this Court recognized in *Glass Bottle Blowers* that the effects of an improper election cannot be purged without utilizing Title IV's procedures. 389 U.S. at 474-75. If the 1981 court-ordered election was improper, its effects will not be eradicated by the 1983 election.

Thus, the 1983 election will not nullify the Secretary of Labor's authority with respect to the 1980 election or render moot the issues before the court.

2. *The Collateral Effects of the Lower Court's Decisions Prevent Mootness*

Respondents ignore the fact that there are claims for damages resulting from the district court's injunction. Those claims cannot be resolved unless there is a decision on the merits of this appeal. And this Court has recognized that collateral claims which create "a substantial stake in the judgment" prevent a case from being considered to be moot. *Liner* v. *Jafco*, 375 U.S. 301, 305-07 (1964); *Walling* v. *Reuter, Inc.*, 321 U.S. 671, 674-75 (1944). There were no similar claims for damages in *Canez* v. *Guerrero*, 707 F.2d 443 (9th Cir. 1983), relied upon by Respondents.

Among the pending claims is that of Petitioner George Harris, former president of the Union who lost his bid for re-election in the court-ordered 1981 election. If Harris won the 1980 election, in which he was a candidate, he would have a claim for back salary lost as a result of the improper injunction. Such a claim for payments wrongfully withheld has been held to be sufficient to maintain a "live" case or controversy. *Powell* v. *McCormack*, 395 U.S. 486, 496-99 (1969); *Stanton* v. *Stan-*

ton, 421 U.S. 7, 11 (1975). Harris' loss in the rerun election also distinguishes this case from *Canez*, in which all of the incumbent officers were re-elected. 707 F.2d at 445, 446.

Another claim pending here involves Respondents' application for a substantial award of attorney fees (Pet. Br. App. at 1a-7a). That application cannot be resolved, either in terms of entitlement or amount, unless this Court determines whether the district court had authority to grant any relief or, if jurisdiction existed to grant some relief, the extent thereof. Such outstanding questions have been held to maintain a "live" controversy between the parties. *Kerr* v. *Screen Extras Guild, Inc.*, 466 F.2d 1267, 1270 (9th Cir. 1972), *cert. denied*, 412 U.S. 918 (1973); *Yablonski* v. *Mine Workers*, 459 F.2d 1201 (D.C. Cir. 1972). In contrast, the *Canez* court denied plaintiff's application for attorney fees. 707 F.2d at 447.

Also to be resolved is Respondents' claim for damages in the amount of $15,000.00 (JA 33), and the Union's claim for the costs incurred in the court-ordered election. The Union has additional claims resulting from the overbreadth of the injunction. *Monroe Div., Litton Business Systems* v. *De Bari*, 562 F.2d 30, 32 (10th Cir. 1977). This Court has recognized financial claims as being sufficient to preclude a finding a mootness even if other issues are resolved between the parties or by supervening events.[12] *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 9-10 1974); *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 216 n.9 (1977); *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 8-9 (1978). Again, this Court must reach the merits of the pending claims in order for the lower court to determine the respective claims for

[12] Respondents misquote *Moore's Federal Practice* on this point, (Resp. Br. at 22 n.9), a fact apparent from that publication itself, as well as from this Court's decision in *Powell* v. *McCormack*, 395 U.S. at 497. *See also, Central Soya Co., Inc.* v. *Consolidated Rail Corp.*, 614 F.2d 684, 687 n.4 (7th Cir. 1980).

damages. *Flagg Brothers, Inc.* v. *Brooks*, 436 U.S. 149, 154 n.3 (1978).

Finally, this Court's decision will resolve whether the lower courts have jurisdiction to consider Respondents' motion for contempt based on the July 13, 1981 injunction. Respondents had sought compensatory and punitive damages in that action, as well as attorney fees. It is well established that a proceeding for civil contempt is part of the original action and a contempt judgment stands or falls with the validity or invalidity of the order. *Latrobe Steel Co.* v. *United Steelworkers*, 545 F.2d 1336, 1345-46 (3d Cir. 1976); *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 444-45 (1911). Thus, the right of Respondents to pursue a motion for contempt and to recover their alleged damages will be controlled by resolution of the merits of the issues in this appeal.[13] *See, Trans Int'l Airlines* v. *Teamsters*, 650 F. 949, 955 (9th Cir. 1980), *cert. denied*, —— U.S. —— (——).

The unresolved collateral disputes between the parties prevent a finding of mootness and require that a decision be rendered on the merits of the issues presented in the petition.

3. *The Issues In Dispute Are Capable of Repetition, Yet Evading Review*

Respondents' claims of mootness must also be rejected based on the "capable of repetition, yet evading review" doctrine recognized by this Court.[14] This Court has frequently utilized that test in election cases,[15] finding it ap-

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[13] On August 31, 1983, the district court dismissed the motion for contempt as being without merit.

[14] *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 125-26 (1974). The doctrine has also been applied to cases involving private conduct. *Central Soya Co., Inc.* v. *Consolidated Rail Corp.*, 614 F.2d at 688-89 and n.7.

[15] *E.g., Democratic Party of U.S.* v. *Wisconsin*, 450 U.S. 107, 115 n.13 (1981); *Mandel* v. *Bradley*, 432 U.S. 173, 175 n.1 (1977); *Rosario* v. *Rockefeller*, 410 U.S. 752, 756 n.5 (1973).

propriate, even after the election in question has been completed and the results cannot be affected, to resolve misunderstandings as to the application and facial validity of electoral statutes. *Storer* v. *Brown*, 415 U.S. 724, 737 n.8 (1974); *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969).

Use of the "capable of repetition, yet evading review" doctrine requires a challenged action which is too short in duration to be fully litigated and to which the complaining party is again likely to be subjected. *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975). Respondents do not contest the inability of union election cases to be fully litigated during the interval between regularly scheduled elections.[16] Rather, they claim that, in this case, it is unlikely that the identical parties will again be involved in the same litigation because some of the Respondent Union members are no longer in the Union and because the Union has been enjoined from violating the law in the future (Resp. Br. at 32).

As this Court has been advised, Respondents brought a contempt proceeding before the district court alleging that the Union violated the terms of the 1981 injunction. Thus, it is disingenuous for them to have represented to this Court that "there is virtually no chance of a recurrence of the complained of conduct" (*id.*) because of the injunctive order while they pursued a contempt motion alleging a violation of that injunction. Moreover, during the course of the contempt proceeding, Respondent Jerome Crowley indicated his intent to run for office in the 1983 election and, at oral argument on March 31, 1983, counsel

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[16] That reality has been implicitly recognized by this Court in *Wirtz* v. *Glass Bottle Blowers*, 389 U.S. 463 (1968), and its progeny. And if this Court adopts the rationale of the *Canez* court, this type of case will never be fully litigated. If the incumbents win a court-ordered election the case will be moot, while if the challengers are successful in the court-ordered election and assume control of the union, they will not continue the union's challenge to the court's authority to have ordered the election.

for Respondents suggested that it might be necessary for some entity to supervise the 1983 election.

The burden of proving mootness "is a heavy one" and must be borne by the party advancing that contention. *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953). It is submitted that the record in this case does not support Respondents' position. Here, as was the case in *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, the event which gave rise to the litigation reoccurs on a regular cycle. At least some of the Respondents and the Union as an entity will soon be engaged in an election in which there is a "reasonable likelihood" that the Union will be subjected to a suit raising similar questions of the interpretation and application of Titles I and IV of the LMRDA. That is sufficient to satisfy the "capable of repetition, yet evading review" doctrine.[17] *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 377 (1979.

Thus, the statutory interpretation issues pending before this Court should be resolved on the merits at this time.

II. THE ORDERS OF THE LOWER COURTS ARE INCONSISTENT WITH THE STATUTE

The relief requested from this Court is predicated on the Union's contention that the district court should have dismissed the complaint because Respondents were requesting a remedy which necessitated the nullification of the election and the conduct of a rerun election.[18] Thus, in the Union's view, Respondents were not requesting relief which was "appropriate" under Title I. If the

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[17] The Union need not demonstrate that identical violations will occur which will result in an identical order from the district court, as Respondents allege (Resp. Br. at 32).

[18] At the first hearing in this case, Respondents' counsel advised the court that if the relief requested were granted, "defendants are going to have to hold a new election . . ." (JA 80).

Court accepts this position, a remand to the lower court with direction to dismiss the complaint, vacate the injunction and release the ballots cast in the 1980 election would be proper. Yet in so doing, the Court need not preclude a district court from ever considering a pre-election complaint seeking "appropriate" relief for a violation of Title I.[19]

A. The Relief Granted Was Not "Appropriate" Under Section 102

Respondents have elected to ignore the specific references in the legislative history set forth in the opening briefs of the Union and its supporters which evidence the Congressional intent to vest primary authority for the supervision of union elections of officers in the Secretary of Labor, not the judiciary. Similarly, they have declined to challenge the numerous decisions of this Court which have reviewed that history and concluded that Congress vested the Secretary of Labor, the agent of government "most familiar with union problems," with authority to seek nullification of union elections of officers and with responsibility for supervising rerun elections. *Calhoon* v. *Harvey*, 379 U.S. 134, 139-40 (1964). Thus, the Union relies upon the discussion of these matters set forth in its opening brief (at 16-30). The Union replies to Respondents' major contentions as follows:

1. The adoption of Title I was not exclusively motivated by Congress' perception that Title IV was insufficient to adequately regulate union elections of officers, as Respondents contend. Rather, Congress was primarily concerned that the pending legislation did not guarantee union members the right to participate in other "vital

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[19] There is simply no basis for Respondents' allegation that the Union and its supporters urge the Court to require the federal courts to "disregard all Title I violations" (Resp. Br. at 52). Rather, the Union's position is similar to that expressed by Circuit Judge Campbell, in dissent (Pet. App. B at 82a-85a).

union decisions."[20] Although Section 101(a)(1), 29 U.S.C. § 411(a)(1), protects the right to nominate candidates and vote in elections, unions conduct many elections and referenda which are not governed by Title IV. Nominations and elections of business agents, shop stewards, hiring hall dispatchers and other union officials are not regulated by Title IV because these persons are not "officers" within the meaning of the Act.[21] Yet Congress intended to ensure union members the right to participate in these elections as well. Other common electoral matters not covered by Title IV, but of concern to Congress, included strike and contract ratification votes, assessments, and dues increases.[22]

By upholding the primary jurisdiction of Title IV over elections of union officers, this Court need not minimize Title I's extensive role in protecting union members' rights in other electoral matters. But recognition of Title I's importance in the context of non-"officer" elections does not require a conclusion that Title I was to be broadly interpreted to supplement or replace Title IV's procedures governing "officer" elections. Respondents' failure to recognize the broader scope of Title I's coverage leads to their faulty conclusion as to the relative role of that Title in the context of elections of officers.

2. The fact that Congress desired union election disputes to be expeditiously resolved does not support the conclusion that officer elections were intended to be overturned based on facts developed during hearings on preliminary injunctions, technical violations, or statutory breaches which did not affect the outcome of the election.[23]

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[20] S. Rept. No. 1684, 85th Cong., 2d Sess., at 52-53 (1958).

[21] *See*, 29 U.S.C. § 402(n).

[22] S. Rept. No. 1684, *supra* n.20, at 56-58.

[23] *Wirtz* v. *Hotel Employees Union*, 391 U.S. 492, 505 n.11 (1968).

Rather, Congress intended the elaborate hearing and review procedures of Section 402 to focus on the *merits* of allegations of impropriety and required a determination of their effect on the outcome of an election. This Congressional objective cannot be achieved through a hearing on a motion for a temporary or preliminary injunction which does not focus on the merits of a case.[24] *Benson Hotel Corp.* v. *Woods*, 168 F.2d 694, 696 (8th Cir. 1948); *Virginia Petroleum Jobbers Ass'n* v. *Federal Power Com'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). And when, as in this case, a district court grants essentially the permanent relief requested after a preliminary hearing at which plaintiffs are only required to establish cause for emergency relief, defendants are denied their due process rights to have plaintiffs meet the more stringent burden of proving the merits of their claims. *Public Service Com'n* v. *Wisc. Telephone Co.*, 289 U.S. 68, 70 (1933).[25]

Adoption of Respondents' contentions would result in the vast majority of Title IV issues being resolved in a perfunctory manner in which the only criteria would be whether a violation *may* have occurred rather than an evaluation of whether the violation *did* occur and may have affected the outcome of the election. Resolution of

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[24] In this case, for example, the temporary restraining order was issued before any live testimony had been presented to the court. Similarly, in *Canez* v. *Guerrero*, the court did not even hear the union's answer to the complaint before granting the injunctive relief requested. 707 F.2d at 445.

[25] To enable courts to fashion the prompt and flexible pre-election relief which Respondents and their *amicus* suggest is the preferable method of resolving election complaints, these issues must be considered on expedited motions for temporary or preliminary relief. Otherwise, the civil litigation process will be subject to the same delays Respondents find so reprehensible in post-election suits brought by the Secretary of Labor.

election complaints in this fashion ignores the legislative history set forth in the Union's opening brief (at 28-30), as well as principles of equity and due process.

3. Respondents' contention that the Secretary of Labor is powerless to redress the type of violations at issue in this case is totally without merit (Resp. Br. at 65-72). Even a cursory examination of the suits filed by the Department of Labor confirms the Secretary's willingness to file Title IV suits to challenge the type of conduct complained of here.[26] Thus, in *Hodgson* v. *Aircraft Workers Alliance*, No. C68-743 (N.D. Oh., filed Oct. 3, 1968),[27] the Secretary successfully litigated a complaint based on a candidate's disqualification due to a union's internal disciplinary proceeding which violated Section 101(a)(5), 29 U.S.C. § 411(a)(5). *Hodgson* v. *Machinists, District Lodge 508*, C-71-663-RFD (N.D. Cal., filed Apr. 6, 1971)[28] involved a successful suit brought in response to a complaint that nominees' names had not been properly recorded by the union with the result that opposition was limited or eliminated. In *Goldberg* v. *Asociasion Insular de Guardianes*, No. 120-61 (D.P.R., filed June 9, 1961),[29] a new election was obtained where the union had failed to list the names of some candidates on the ballot. Cases brought to challenge union rules which prevented mem-

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[26] *See*, U.S. Department of Labor, *Union Officer Elections and Trusteeships Case Digest* (1980). This publication also evidences the unreliability of the statistics developed in the Yale Law Journal Note cited by Respondents in support of their contention that the Secretary does not deal with election complaints in an expeditious manner (Resp. Br. at 74-76). Those statistics ignore the numerous instances in which the Secretary succeeds in obtaining a new election by agreement, rather than litigation.

[27] *Id.* at 346.

[28] *Id.* at 344.

[29] *Id.* at 608.

bers from attending and/or participating in the nomination meeting are legion.[30]

To the extent this portion of Respondents' argument has any support, it relies on law review articles which advance public policy claims that pre-election relief is preferable to post-election remedies.[31] That question is one which Congress resolved against Respondents in 1959, and it is not for this Court to alter that legislative judgment.

4. Neither the Union, nor the AFL-CIO as *amicus* in its support, has contended that Congress intended to grant state court remedies preferential treatment to those in Title I, as Respondents allege (Resp. Br. at 84). As the Union noted in its opening brief, Section 403's preservation of existing state remedies regarding elections of union officers was the subject of political compromise between those who sought to preempt all state laws in this area and those seeking to preserve such remedies.[32] To reconcile these views, Section 403 preserved state remedies "to enforce the constitution and bylaws of a labor organization" and limited that authority "to elections prior to the conduct thereof . . . ." 29 U.S.C. § 483.

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[30] *Id.* at 527-639.

[31] Respondents' misrepresent *Navarro* v. *Gannon*, 385 F.2d 512 (2d Cir. 1967), cert. denied, 390 U.S. 989 (1968), as a Title IV case (Resp. Br. at 71). In fact, it dealt exclusively with Title I issues. 385 F.2d at 514. Equally inaccurate is their contention that the *Canez* decision supports their view of the Act (Resp. Br. at 72). As Respondents themselves have noted, that case was dismissed as moot, the circuit court declining to consider the merits of the appeal. 707 F.2d at 446-447.

[32] *Compare*, testimony of Clyde Summers *with* that of Archibald Cox before the Senate Labor and Public Welfare Committee. *Union Financial and Administrative Practices, Hearings Before The Senate Subcommittee on Labor and Public Welfare*, 85th Cong., 2d Sess. 613 (statement of Clyde Summers) and 881 (statement of Archibald Cox) (1958).

Contrary to Respondents' inference, there was no extensive body of state law in existence governing the details of union elections with which Congress intended to supplement the requirements of Title IV[33] (Resp. Br. at 87). Rather, in adopting Section 403, Congress merely preserved the authority of state courts to enforce union constitutions. And Congress deliberately preempted that law once the election has been held.[34] State courts have not been granted any greater authority than federal courts to set aside the results of union elections of officers upon direct complaints from union members.

Thus, Respondents' arguments do not refute the Union's review of the legislative record and decisions of this Court which establish that Congress did not intend federal courts to rerun union elections of officers under Title I. While pre-election remedies under Title I are not precluded merely because a violation occurred in the context of an election of officers, the relief granted by the district court in this case was not "appropriate" because it nullified an election and conditioned its rerun on the supervision of the court.

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[33] "The present law does not provide adequate guarantees. Although suits have been brought in State and Federal courts, few useful rules have developed. . . . A (State) court can do no more than enforce the union's own constitution and bylaws." *Senate Labor and Public Welfare Committee Hearings, Labor-Management Reform Legislation*, 86th Cong., 1st Sess. 132-33 (1959) (statement of Archibald Cox). *See also*, Summers, *Judicial Regulation of Union Elections*, 70 Yale L.J. 1221, 1222 (1961). (Respondents incorrectly assert that this article was written "before the passage of the LMRDA . . . and did not consider Title I issues at all . . ." (Resp. Br. at 86 n.49). In fact, it was written after the Act. *See*, 70 Yale L.J. at 1221.)

[34] Respondents inaccurately quote the Columbia Law Review note which criticized this Court's decision in *Calhoon* v. *Harvey*, 379 U.S. 134 (Resp. Br. at 85 n.48).

B. The Election At Issue Was "Already Conducted" Under Section 403

In response to the Union's contention that the election here was "already conducted" at the time the district court enjoined the tabulation of the ballots, Respondents assert that the cases relied on by the Union do not support that proposition. They contend that *Canez* v. *Guerrero*, 707 F.2d 443, "is in accord with the decision of the First Circuit in the instant case" (Resp. Br. at 91), suggesting that the Ninth Circuit agreed that the suit here sought pre-election relief. Yet the *Canez* court referred to this case as involving a request for *post-election* relief no fewer than three separate times during its brief decision. 707 F.2d at 446 and n.1.

Respondents' analysis of the other cases relied upon by the Union is no more accurate. In *Laski* v. *Inter. Org. of Masters, Mates & Pilots*, 502 F. Supp. 134, 136 (S.D.N.Y. 1980), the court rejected an attempt to enjoin the tabulation of ballots in a mail election, holding that an election was conducted once "the actual voting process is under way." There, as here, suit was filed after the ballots had been distributed to the members. 502 F. Supp. at 135. Yet that court adopted the reasoning of the Third Circuit in *McDonough* v. *Local 825, Operating Engineers*,[**] while the courts in this case rejected that rationale (Pet. App. A at 10a; Pet. App. B at 67a). *New Action Coalition* v. *Local 2, United Fed. of Teachers*, 510 F. Supp. 1208 (S.D.N.Y. 1981), also was a post-election case under *McDonough*, but would have been pre-election had that court adopted the First Circuit's interpretation that "an election is not 'already conducted' until all the ballots are counted. . . ."

Thus, the courts of appeal for the Second, Third, Ninth and District of Columbia circuits stand in opposition to the position taken by the First Circuit in this case. It is

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[**] 470 F.2d 261 (3d Cir. 1972).

submitted that the Union's position that an election has been "already conducted" at the point when the requested relief would necessitate nullification of ballots already cast and the conduct of a new election is more in accord with the legislative history and the decisions of the courts than is the mechanistic formula adopted by the lower court.

III. CONCLUSION

For the reasons set forth above and in the opening brief, it is requested that the case be considered on its merits and the decision below reversed.

Respectfully submitted,

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No. 82-432

In the Supreme Court of the United States

OCTOBER TERM, 1983

LOCAL NO. 82, FURNITURE AND PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN, AND PACKERS, ET AL., PETITIONERS

v.

JEROME CROWLEY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENT

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REPLY BRIEF FOR THE FEDERAL RESPONDENT

Respondents contend that this case is partially moot because Local No. 82 stipulated in district court that it would void the ballots of the 1980 election and conduct a new election (Resp. Br. 20-27). They also argue that the occurrence of the local's regularly scheduled 1983 election moots this case entirely (*id.* at 28-34). Finally, they suggest for a number of reasons that a district court may enjoin the counting of ballots and order a new union officer election under court supervision in order to remedy violations of Title I of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 411 *et seq.*) oc-

curring at a nominations meeting. These contentions are without merit.

1. Respondents' first claim is that, as a result of stipulations made by the defendants ("the union") in the district court, this case no longer "concern[s] [(a)] the propriety of the District Court's having enjoined an election from proceeding and/or [(b)] ordered an election to be rerun. * * * And it does not concern [(c)] the Court's having named third parties * * * to supervise the conduct of an election" (Resp. Br. 15). This claim is frivolous.

As to the first of those issues—the district court's temporary restraining order enjoining the counting of ballots in the 1980 election (see Resp. Br. 3 n.1)—it is clear that the court of appeals did not share respondents' conviction that the matter was moot. It explicitly rejected the factual contention that the union itself had declared the 1980 election "null and void" (Resp. Br. 15). Respondents believe that that was the inevitable effect of "stipulations" made by the union in proceedings held in the district court on January 9, 1981 (Resp. Br. 4-7 n.2). But the court of appeals understood the record differently, recognizing that the " 'stipulations' " were "offers of settlement to which appellants agreed to be bound, if appellees so agreed[,]" rather than "true factual stipulations narrowing the factual dispute" (Pet. App. 72a n.22). Because it understood the record in that way, the court considered and rejected on the merits the Secretary's argument "that the district court's TRO * * * was error" (*id.* at 47a, 61a-67a).

In fact, it appears that the district court itself concluded that the union's "stipulations" did not render the TRO issue moot. In the preliminary injunction

entered on July 13, 1981, the district court found it necessary to order that (Pet. App. 86a):

> The nominations received at the November 9, 1980 meeting of defendant local 82, and the election originally scheduled to be completed on December 13, 1980, are legally without effect pending further order of this court. The ballots from that election shall remain in the custody of an officer of this court.

Respondents make no more convincing showing that the second issue—the district court's order directing a rerun election—is moot. This claim rests as well on the "stipulations" that the court of appeals found not to be binding. Here too the court of appeals addressed and rejected on the merits the union's and the Secretary's objections to this relief (Pet. App. 46a-61a).

The district court likewise saw no mootness problem lurking about this issue: the preliminary injunction directed that the union must conduct a new nominations meeting and mail ballot election within 80 days (Pet. App. 86a). And in its opinion the district court found "plainly without merit" the argument that the union's "stipulation that they will conduct a new nominations meeting and election * * * [rendered] plaintiffs' remaining Title I claims * * * moot" (Pet. App. 13a). The union's proposal was, after all, nothing more than the " 'voluntary cessation of allegedly illegal conduct' " (*ibid.*, quoting *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953)). See also *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982).[1]

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[1] It is true that these observations are generally made in response to defendants' claims that a case is moot. But they

Respondents' claim concerning the third issue—that the union agreed to supervision of a new election by a third party appointed by the court (Resp. Br. 9 & n.4)—simply distorts the record. The "third party" to which the union's counsel referred was Joint Council 10 (J.A. 104). He went on to say that "it would be a gross misrepresentation * * * [to] conclude * * * that we were finding acceptable either the third party that Mr. Stern comes up with or the special master" (J.A. 111).

2. Respondents' second contention is that this case must be moot in its entirety once the officers chosen in 1981 complete their terms and the union's 1983 triennial election has occurred (Resp. Br. 28-34). (We are informed by petitioners that Local No. 82's 1983 election was completed on December 17, 1983, and that the new officers will be installed in January 1984.) This contention also is without merit.

In the first place, as petitioners note in their reply brief (Reply Br. 7-9), the preliminary injunction entered by the district court has continuing collateral consequences for the union and the individual petitioners and respondents. These include, according to petitioners, unresolved issues about the union's claim for the costs of the court-ordered election, respondents' application for attorneys' fees and their claim for damages, and salary claims of those who lost the court-ordered election but may—if the ballots impounded by the court are ever counted—turn out to have won the 1980 election.

Perhaps more important, however, respondents' contention ignores the continuing interest represented

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are hardly less pertinent where the claim of mootness is raised by a plaintiff, and the defendants themselves abjure any intent to do voluntarily what the court has directed.

by the Secretary in this litigation. In *Wirtz* v. *Local 153, Glass Bottle Blowers' Ass'n*, 389 U.S. 463 (1968), this Court held that the occurrence of a supervening election did not moot the Secretary's right to challenge an earlier election that he found violated Title IV of the Act, and to seek a new election conducted under his supervision. The court of appeals there had concluded "that it would serve 'no practical purpose' to void an old election once the terms of office conferred have been terminated by a new election." 389 U.S. at 475. This Court rejected that conclusion for two reasons (*ibid.*):

> First, it fails to consider the incumbents' possible influence on the new election. Second, it seems to view the Act as designed merely to protect the right of a union member to run for a particular office in a particular election. But the Act is not so limited, for Congress emphatically asserted a vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member.

See also *Wirtz* v. *Local No. 125, Laborers' Union*, 389 U.S. 477 (1968) (same); *NLRB* v. *Raytheon Co.*, 398 U.S. 25 (1970) (Board's right to seek enforcement of cease and desist order not mooted by occurrence of two supervening representation elections).

In this case respondents claim that the occurrence of a supervening election moots the Secretary's challenge to the district court's order directing an earlier election, contrary to Title IV. But as *Bottler Blowers'* makes clear, the outcome of one election may affect the next, in part because of the advantages incumbents enjoy.[2] It could be argued that the election

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[2] Cf. *Carroll* v. *Princess Anne*, 393 U.S. 175, 178 (1968) (10-day TRO upheld by state court not moot since it "con-

conducted by the district court—though unauthorized by the Act—at least had some guarantee of correctness, and would not have affected the next election in the way the challenged election in *Bottle Blowers'* did. But we have no assurance that that is so. After all, the incumbents in the court-ordered 1981 election were the same individuals charged with violating the Act in 1980. And as Congress was aware when it passed the Act, "[a] court is * * * a clumsy instrument for supervising an election." *Labor-Management Reform Legislation: Hearings on S. 505 et al. Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 86th Cong., 1st Sess. 133 (1959). Indeed, respondents themselves argued in the district court that one of the incumbents (who petitioners inform us was reelected in both 1981 and 1983) continued his violations notwithstanding the preliminary injunction.[3]

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tinues to play a substantial role in the response of officials to [petitioners'] activities"); *Nader* v. *Butz*, 474 F.2d 426, 428 (D.C. Cir. 1972) (challenge to 1971-1972 price supports not mooted by establishment of new supports for 1972-1973, since "the improprieties charged to the 1971-72 determination might also have tainted the 1972-73 determination").

[3] See respondents' Proposed Contempt Judgment and Order, lodged with our brief on the merits with the Clerk of this Court. The district court dismissed respondents' contempt motion on August 31, 1983 (Pet. Reply Br. 9 n.13).

Moreover, the district court acknowledged that it was without authority to correct violations of Title IV that may have occurred in connection with the 1980 election. One such violation asserted by respondents was that the union had imposed an unreasonable qualification on candidate eligibility (Pet. App. 7a-8a, 12a-13a). Because the court had no jurisdiction over this asserted Title IV violation, it was unable to do anything to correct it in the 1981 rerun (see Pet. App. 88a).

But the question of mootness need not, in any event, turn on proof that defects in the court-ordered election tainted the results of the 1983 balloting. For in its preliminary injunction the court also retained custody of the ballots from the 1980 election (Pet. App. 86a). That portion of the judgment still prevents the Secretary from fulfilling his statutory obligation to investigate complaints about the conduct of elections (29 U.S.C. 482(b)) and to protect the "vital public interest in assuring free and democratic union elections" (*Wirtz* v. *Local 153, Glass Bottle Blowers' Ass'n*, 389 U.S. at 475) by *himself* supervising the conduct of a new election in appropriate cases (29 U.S.C. 482(c)).[4]

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[4] Respondents mistakenly urge that it is now too late for the Secretary to fulfill that duty (Resp. Br. 30 n.14). But for purposes of the complaint procedure envisioned by the Act (29 U.S.C. 482(a)) the 1980 election has never been completed, since the ballots have not been opened and tabulated, and no results have been announced. There, is, moreover, a second reason why a complaint would still be timely. The pre-election protest procedures permitted by the union were interrupted because this action was filed (J.A. 120), and no final decision has been rendered there. It is still open to a complaining member to await exhaustion of those proceedings (see 29 U.S.C. 482(a)(1)), before filing with the Secretary.

For these reasons this case is plainly distinguishable from *Canez* v. *Guerrero*, 707 F.2d 443 (9th Cir. 1983), relied upon by respondents (Resp. Br. 34). In that case the election was completed, and Title IV complaints were filed and denied by the Secretary. 707 F.2d at 446 n.2.

If the Court should conclude, contrary to petitioners' and our submission, that this case is now moot, it should follow its established practice in dealing with civil cases from courts in the federal system that have become moot while pending this Court's decision on the merits, by vacating the judgment of the court of appeals and remanding the case with directions to dismiss the complaint as moot. See, *e.g.*, *Great Western*

3. Concerning the merits, respondents first assert that there is nothing improper about a court's enjoining the counting of ballots in a union officer election while it decides a claim that Title I of the Act has been violated (Resp. Br. 57-62). This is so, they argue, for three reasons. To begin with, Title I has no counterpart to the requirement in Title IV that "[t]he challenged election shall be presumed valid pending a final decision thereon" (29 U.S.C. 482(a)). Moreover, they contend, violations of Title I are more serious than the merely "technical requirement[s] of Title IV," so there is more reason to prevent wrongdoing incumbents from assuming office pendente lite (Resp. Br. 58-59). Finally, they argue that halting an election under Title I is more permissible because "[t]he process for remedying violations of Title IV is slow," while "Title I specifically provides for direct appeal to the Courts, for discretionary waiver of exhaustion requirements, and for issuance of injunctive relief" (Resp. Br. 60).

The first of these reasons—the difference in the specific language of Titles I and IV—is amply treated in our opening brief (Gov't Br. 27-35). We there point out that Title I relief *is* specifically limited to what is "appropriate" (29 U.S.C. 412), and that permitting courts to halt ongoing elections in cases where Titles I and IV overlap would inexcusably obliterate Title IV's explicit and detailed procedures for challenging elections.[5] We also note that Title I's

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Sugar Co. v. *Nelson*, 442 U.S. 92, 93 (1979); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950).

[5] See, *e.g.*, 29 U.S.C. 482(a) (member must exhaust internal remedies before asking Secretary to overturn election; a challenged election is presumed valid pending a final decision), 482(b) (Secretary to sue only if he finds probable cause to believe an unremedied violation has occurred), 482(c)

use of the word "appropriate" (and its failure to state that challenged elections shall be presumed valid) is entirely in keeping with the fact that Title I protects a broad spectrum of rights, many of which have nothing to do with elections, others of which (though they apply to elections) are not limited to union *officer* elections (Resp. Br. 28).

Respondents' second reason—that those accused of Title I violations are somehow less worthy than those who may have violated Title IV, and so can more justifiably be prevented from assuming office—is frivolous. Far from being merely "technical" (Resp. Br. 58), Title IV's guarantees (an opportunity to nominate, the right to vote, to be a candidate, to support a candidate, to have one's vote counted equally, to have "[a]dequate safeguards to insure a fair election") are the very essence of union democracy. Congress directed that challenged elections be presumed valid not because it viewed infringement of those rights as mere peccadillos, but because it appreciated the difference between accusation and proof, and because it thought that "[t]he newly elected officers would be more likely to have the support of the members." Cox, *The Role of Law in Preserving Union Democracy*, 72 Harv. L. Rev. 609, 634 (1959). On the other hand, enjoining an ongoing election has the perverse effect of keeping in office the very incumbents most likely to have committed violations, despite the possibility that the enjoined election may have dislodged them from office.

Nor is there any support for the claim that disruption of the election process is tolerable because

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(court to order new election only if the violation may have affected the outcome), 483 (Title IV remedy "for challenging an election already conducted shall be exclusive"). See also 29 U.S.C. 481 (b) (local unions must hold elections every three years).

courts will afford more prompt relief under Title I than is available under Title IV. As an initial matter, the union's internal remedies (derailed by the filing of this action, J.A. 120) might have corrected the situation here in far less time than the full year consumed in the district court. And even where the complainant does have to seek the aid of the Secretary, respondents have not shown that the resulting delays in conducting a rerun are necessarily more severe than the year taken by the district court, since the Secretary is able to obtain voluntary compliance from the union in nearly half the cases in which he finds violations that must be remedied.*

4. Respondents argue in the alternative that courts must be able to act as the district court did here, because the Secretary cannot effectively protect Title I rights via the procedure specified in Title IV (Resp. Br. 64-71). That is so, they contend, for two reasons. First, the rights protected by Titles I and IV are not coextensive. Second, even if they were, relief is available under Title IV only where the violation may have affected the outcome of an election.

It is surely correct to say (as we in fact do in our opening brief (Gov't Br. 28-29)) that Title I protects rights not covered by Title IV. But the relevant ques-

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* Respondents cite statistics (Br. 75-76) purporting to show long delays in the implementation of Title IV remedies. But the figures cited cover only cases that are litigated, and thus do not present an accurate picture. For the 13-year period between 1965 and 1978, the Secretary obtained voluntary compliance without litigation in nearly 45% of the cases in which he found violations requiring a remedy. U.S. Dep't of Labor, *Compliance, Enforcement and Reporting in 1978 Under the Labor-Management Reporting and Disclosure Act* 4, Table 2 (1981). According to unpublished data from the Department of Labor, the comparable figure for the period from October 1, 1978, through September 30, 1982, was 42.8%.

tion is whether Title I protects any rights in union officer elections that are not covered by Title IV, and that can only be remedied by conducting a new election. It is difficult to imagine such a case, and respondents have suggested none. They do assert (Resp. Br. 67) that "Title IV would not protect * * * [a member's] rights 'to express at meetings of a labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting' " (see 29 U.S.C. 411(a)(2)). But Section 401(e) (29 U.S.C. 481(e)) (emphasis added) specifically guarantees members "a reasonable opportunity * * * for the nomination of candidates" and "the right to vote for *or otherwise support* the candidate or candidates of [their] choice * * *." Respondents also claim that Title IV affords no protection against a member's being " 'fined, suspended, expelled, or otherwise disciplined' in reprisal for exercising rights protected under Title I" (Resp. Br. 67). But, again, Section 401(e) specifically states that members shall have "the right to vote for or otherwise support * * * candidates * * * without being subject to penalty, discipline, or improper interference or reprisal of any kind * * *."[7]

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[7] Respondents mistakenly state that "[t]he two violations complained of and the subject of the instant appeal, and a third one not appealed are violations the Secretary has no power to redress under Title IV, as he recognizes in his regulations" (Resp. Br. 65). But the regulation cited (29 C.F.R. 452.7) says only that "*[d]irect* enforcement of Title I rights, *as such*, is limited to civil suit in a district court" (emphasis added). As to the violations in this case, respondents' claim is simply wrong. The violations currently at issue are the exclusion of Crowley and others from the nominations meeting (see Pet. App. 22a; J.A. 32) and the refusal to recognize the nomination of Lynch for the office of secretary-treasurer

Respondents' second point is no more convincing. They contend (Resp. Br. 68-71) that even where Titles I and IV overlap a district court must be able to enjoin an ongoing election and order a rerun to correct Title I violations, because Title IV permits the Secretary to act only where "the violation * * * may have affected the outcome" (29 U.S.C. 482(c)(2)). But it would be irrational to permit the kind of remedial overkill this argument envisions. If it cannot even be said that a violation "*may*" have affected the outcome of an election, it is surely not "appropriate" (29 U.S.C. 412) to subject the union and its members to the draconian measures respondents suggest. As we noted in our opening brief (Gov't Br. 44), nothing in the Act would prevent a Title I court in such cases from entertaining actions for damages, or even resorting to "equitable remedies that did not result in delay or judicial supervision of the election process." [8]

(*ibid.*). Both of those actions, if proved, would be contrary to the provision in Section 401(e) (29 U.S.C. 481(e)) of "a reasonable opportunity * * * for the nomination of candidates" and "the right to * * * support the candidate or candidates of [one's] choice." The refusal to recognize Lynch as a candidate also conflicts with the right of "every member in good standing [to] be eligible to be a candidate." The "third [violation] not appealed," to which respondents refer (Resp. Br. 65), apparently is the disciplinary action taken against Robert Lunnin, who nominated Lynch and the next day challenged the nominating process internally (J.A. 30; but see Pet. App. 20a). As the district court noted, Teamsters Joint Council 10 overturned the disciplinary sanctions imposed on Lunnin (Pet. App. 6a).

[8] Respondents err, however, in saying that "the only part of the election the Secretary could or would have ordered rerun under Title IV was Griffith's running unopposed for the Secretary-Treasurer position" (Resp. Br. 70). Nor is the test under Section 402(c)(2) (29 U.S.C. 482(c)(2)) simply

5. Respondents' final point worthy of mention is that even if the Secretary can protect Title I rights violated during an officer election, there is no reason to believe that he can do better under Title IV than a court can in a Title I suit (Resp. Br. 74-80). But respondents do nothing to undercut the various reasons offered in our opening brief (Gov't Br. 35-45) for believing precisely that. Much less do they explain why the scheme carefully crafted by Congress for challenging union elections (see Gov't Br. 28-32) should be ignored.

Respondents suggest, for example (Resp. Br. 74-77), that courts can conduct new elections more speedily under Title I than the Secretary can under Title IV. There is little merit to this, as we have already shown. See pages 9-10 & note 6, *supra*. In addition, this suggestion ignores the more significant delay in this case—not in conducting the rerun, but in the occurrence of the regularly scheduled 1980 election. Although 29 U.S.C. 481(b) requires local unions to elect officers every three years, the district court held up the 1980 triennial election for an entire

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"mathematical" in the way respondents and the court of appeals (Pet. App. 65a) envision. A numerical calculation is made only where appropriate, such as where the votes of certain members are challenged. See, *e.g.*, *Marshall* v. *American Postal Workers Union*, 486 F. Supp. 79, 82 (D.D.C. 1980). And exclusion of members from a nominations meeting is considered sufficient by itself to affect the outcome for all offices for which there were to be nominations. See *Wirtz* v. *Local Union No. 1622*, 285 F. Supp. 455, 463-464 (N.D. Cal. 1968); *Marshall* v. *Office & Professional Employees*, 107 L.R.R.M. 2456, 2458 (D.D.C. 1981); *Usery* v. *Local Union No. 20, Sheet Metal Workers*, 105 L.R.R.M. 3203, 3205 (D.N.J. 1980).

year. That could not happen under Title IV. 29 U.S.C. 482(a).

The claim that union autonomy was respected here, just as it would have been under Title IV, is even more insubstantial (Resp. Br. 77-79). It may or may not be true that the union was willing to comply with the district court's orders. See pages 2-4, *supra*. But autonomy is respected not by securing consent to a court's wishes, but by permitting the union to clean its own house. See 29 U.S.C. 482(a); *Wirtz* v. *Local 153, Glass Bottle Blowers' Ass'n*, 389 U.S. at 472-473 (quoting S. Rep. 187, 86th Cong., 1st Sess. 21 (1959)). And failing that, Congress sought "to utilize the agencies of Government most familiar with union problems to aid in bringing about a settlement through discussion before resort to the courts." *Calhoon* v. *Harvey*, 379 U.S. 134, 140 (1964).

We also argue in our opening brief (Gov't Br. 38) that the Secretary performs a useful function in screening frivolous complaints. Respondents claim, on the other hand, that courts are actually more adept at dealing with election, due process, and free speech claims—matters frequently litigated in other contexts (Resp. Br. 79). It is true that courts often address constitutional issues quite similar to Title I questions. They also deal with constitutional issues that are like Title IV questions. Compare *Clements* v. *Fashing*, 457 U.S. 957 (1982) (right to be a candidate); *Ball* v. *James*, 451 U.S. 355 (1981) (right to have votes counted equally), with 29 U.S.C. 481(e). But the screening role played by the Secretary consists not so much in resolving refined legal issues as in investigating and determining on the facts whether there is "probable cause to believe that a violation * * * has occurred" (29 U.S.C. 482(b)).

That investigatory role is not one courts are equipped to play.[9]

For these reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded with instructions to vacate the preliminary injunction and return the ballots to the custody of petitioners.

Respectfully submitted.

REX E. LEE
Solicitor General

DECEMBER 1983

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[9] Respondents' assertions that courts can supervise rerun elections as competently as the Secretary (Resp. Br. 80-82), and can consolidate numerous election-related claims in one action (*id.* at 83-84), are adequately addressed in our opening brief (Gov't Br. 17, 30, 34-35, 39, 41).

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No. 82-432

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LOCAL NO. 82, FURNITURE AND PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN, AND PACKERS; BART GRIFFITHS, SECRETARY-TREASURER, LOCAL NO. 82, *et al.*,

Petitioners,

v.

JEROME CROWLEY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 99 national and international unions with a total membership of approximately 14 million working men and women, submits this brief *amicus curiae* with the consent of the parties pursuant to this Court's rules.

SUMMARY OF ARGUMENT

The court below affirmed an injunction the effect of which was "to set aside the earlier nomination and election" that the petitioner union had held and to "order a new election and the procedures therefor." 679 F.2d at 983-84. We demonstrate herein that the injunction was improperly entered for two independent reasons.

I. Congress in enacting Title IV of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 481, *et seq.*, intended to preclude private suits to set aside union elections. Title IV establishes a procedure whereby the Secretary of Labor—and only the Secretary—may sue to overturn a union election. And § 403 of Title IV states: "The remedy provided by this [title] for challenging an election already conducted shall be exclusive."

The language of § 403 suggests that when an election has proceeded to the point that the relief being sought from a court is an order "set[ting] aside" the election and direct[ing] a "new election," that suit is precluded as one brought to "challeng[e] an election already conducted." This conclusion is confirmed by an examination of the legislative history and the "objectives Congress sought to achieve" (p. 7, *infra*) in enacting § 403. The purpose of that section is to insure that the procedures Congress deemed appropriate for actions seeking to set aside union elections cannot be circumvented through private lawsuits. The court below thus erred in reading § 403 to preclude private suits to set aside elections only *after* "all the ballots are counted"; Congress' concern in § 403 was with the *substance of the relief* being sought and not with the suits' *timing*. Part I(A), pp. 4-13, *infra*. To be sure, § 403 was framed before Title I was added to the LMRDA. But there is not one iota of evidence in the language or history of Title I to suggest that Congress intended, in that Title, to authorize a second

and distinct remedy for setting aside union elections. Thus, § 403 is properly read to apply to Title I suits to the same extent as to state-law actions, and to preclude any suit which, like the instant one, seeks to set aside a union election. Part I(B), pp. 13-16, *infra*.

II. Even if the courts below were not statutorily precluded from preventing the counting of the ballots cast in a union election, setting aside the election, and directing a new election at a later date, traditional equitable principles, which are applicable in Title I actions, counsel strongly against the exercise of such authority.

Equity has long been virtually unwilling to enjoin elections, be they public elections or union elections; nothing in Title I's language or legislative history suggests that Congress intended the courts to depart from this long-standing reluctance. Furthermore, enjoining an election injects the court into the midst of a political thicket; were equitable relief against union elections available, federal injunctions would become an important weapon in the campaign arsenal of candidates for union office. And finally, in light of the availability of the post-election remedy under Title IV of the LMRDA, an injunction against an election is not necessary to prevent irreparable harm. Part II, pp. 11-21, *infra*.

ARGUMENT

I. TITLE I OF THE LMRDA MAY NOT BE USED TO BYPASS THE EXCLUSIVE PROCEDURE FOR SETTING ASIDE A UNION ELECTION ESTABLISHED IN TITLE IV OF THAT ACT.

The court below affirmed an injunction the effect of which, in that court's own words, was to "*set aside the earlier nomination and election*" that the petitioner union had held and to "order a new election and the procedures therefor." 679 F.2d at 983-84 (emphasis added). The threshold question here is whether Congress, in enacting Title IV of the LMRDA—the title addressed specifically to union elections—precluded private actions for such relief.

As we proceed to show, the legislative materials compel an affirmative answer to that question. Section 403 (LMRDA § 403, 29 U.S.C. § 483) was included by the Senate Labor Committee in Title IV of the Act to assure that *only* the Secretary of Labor could sue to set aside a union election. That section's point was to preclude *all* remedies existing at the time for overturning union elections (Part A). And, when Title I was added to the LMRDA on the floor of the Senate, Congress did not upset the preclusion rule already stated in § 403 (Part B). Thus, Title I suits as well as state-law suits are precluded to the extent they seek the relief that Title IV empowers the Secretary alone to seek.[1]

A. Title IV of the LMRDA, entitled "Elections," "establishes a set of substantive rules governing union

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[1] We assume for present purposes that the district court correctly found violations of Title I here. Thus, we have no occasion to discuss the interplay between Title I's substantive rules and those stated in Title IV. That question, which has engendered substantial debate in the wake of *Calhoon v. Harvey*, 379 U.S. 134 (1964), is not presented in this case.

elections." *Trbovich v. Mine Workers*, 404 U.S. 528, 531 (1972) (citations omitted). In addition, and of particular relevance here, Title IV "provides a comprehensive procedure for enforcing those rules." *Id.* In broad outline, that procedure is a suit by the Secretary of Labor "to set aside [an] invalid election . . . and to direct the conduct of an election . . . under the supervision of the Secretary" (LMRDA § 402(b), 29 U.S.C. § 482(b)).

The Senate Labor Committee version of what was to become the LMRDA included Title IV and did not include a "Bill of Rights" Title; the latter was added (as Title I) by amendment on the floor of the Senate. But from the outset Congress was aware that state law provided remedies for challenging election-related conduct. In the context of the Title IV debates, therefore, Congress considered the extent to which the Secretary's authority established in that Title should be exclusive. Section 403 states the legislative judgment:

> Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this [title]. *The remedy provided by this [title] for challenging an election already conducted shall be exclusive.*

The court below, although stating that it was "argu[able] that § 483 does not impinge upon Title I at all," 679 F.2d at 985, assumed for purposes of its decision that § 403 applies to Title I suits to the same extent that the section applies to state-law suits. (We show *infra* at 13-16 that that assumption is required by the legislative history of Title I.) The court concluded, however, that § 403 was not intended to preclude *any* suits—state or federal—until "all the ballots are counted," 679 F.2d at 993, reasoning that until such time "an election is not 'already conducted' " within the meaning of § 403, *id.* Because the district court had issued a temporary restraining order against tabulating the ballots—an order which was issued for the sole purpose of "preserv[ing] . . . the court's

jurisdiction," 521 F. Supp. at 618, as against the Secretary of Labor [2]—the court of appeals concluded that the district court was entitled, *seven months later*, to grant what the district court termed "preliminary relief ordering that a new nominations meeting and election be held," 521 F. Supp. at 627. As we proceed to show, this construction of § 403 cannot be squared with either the language or the policies of that provision.

1. At the threshold, the court below erred in wrenching the words "already conducted" from their statutory context. Section 403 does *not* distinguish between suits brought before and suits brought aften an election has been conducted; rather, the section distinguishes between suits brought to "challeng[e] an election already conducted" and all other suits. The focus of the statutory language, then is on the suit's *purpose* and *not* on the suit's *timing*.[3]

Once this is understood, it becomes clear how unlikely the decision below is even as a construction of the bare words of § 403. The relief sought and obtained here, after all, was to "set aside" the election and to direct a "new election." It is all but impossible to understand how one can "set aside" an election that has not been con-

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[2] The district court stated that it also was acting "to avoid irreparable harm to the plaintiffs." 521 F. Supp. at 618. But it is difficult to imagine how plaintiffs could have been harmed by the mere tabulating of the ballots—except insofar as the tabulation, in the district court's view, would have required that jurisdiction be ceded to the Secretary of Labor.

[3] Thus, for example, a suit brought after all ballots have been tabulated and the result announced is *not* precluded by Title IV if the suit is one for damages on account of election-related misdeeds or is one to restrain misconduct from recurring in the future. *E.g.*, *Ross v. Electrical Workers*, 513 F.2d 840 (9th Cir. 1975); *Amalgamated Clothing Workers Rank and File Committee v. Amalgamated Clothing Workers*, 473 F.2d 1303 (3d Cir. 1973).

ducted or order a "new election" if there has not already *been* an election. Thus, the fact that the election had proceeded to the point where it was necessary to "set it aside" demonstrates that at least for the purposes of this suit the election had been "already conducted" within the meaning of this statutory phrase.

2. This Court has, moreover, repeatedly cautioned that in interpreting the LMRDA, "[w]e must look to the objectives Congress sought to achieve, and avoid 'placing great emphasis upon close construction of the words.'" *Steelworkers v. Sadlowski*, —— U.S. ——, 102 S.Ct. 2339, 2345 (1982).[4] And when that inquiry is undertaken it is clear that the "objective Congress sought to achieve" in § 403 was to differentiate between suits seeking to set aside a union election—suits that have a particularly disruptive effect—and other types of suits, including even post-election damage suits. Section 403 was intended to preclude the former type of private actions (whether brought before or after the last ballot is counted) but not the latter.

(a) The decision below holding that the preclusive effect of § 403 depends on the suits' timing and not on the nature of the relief being sought attributes to Congress an idiosyncratic and implausible intent. It is common ground here that Congress, at the least, intended to give the Secretary exclusive authority to sue to set aside an election after the last ballot is counted. Yet the court below has offered no sensible explanation as to why Congress, having made that decision, would have placed dispositive importance on the timing of a suit seeking such relief and would have intended to permit suits seeking to set aside an election so long as the order issues before the last ballot is counted.[5]

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[4] *See also Hall v. Cole*, 412 U.S. 1, 11 & n.17 (1973); *Wirtz v. Bottle Blowers Ass'n*, 389 U.S. 463, 468 & n.6 (1968).

[5] The court of appeals reasoned that defining "already conducted" to mean "when all the ballots are counted" is desirable because

(b) The legislative statements as to the import of § 403 make clear that the court below misconceived Congress' intent. The Senate Labor Committee in its report accompanying the bill explained the section as follows: "[S]ince the bill provides an effective and expeditious remedy for overthrowing an improperly held election and holding a new election, the Federal remedy is made the sole remedy and private litigation would be precluded." [6] This explanation is particularly significant since § 403 was enacted verbatim as reported by the Committee. Similarly, at the end of the Senate consideration of the bill, Senator Goldwater submitted an analysis of the bill which stated: "the remedy provided by this title IV for challenging an election shall be exclusive, that is, shall preempt all other provisions of law." [7] No one even hinted at the dichotomy drawn by the court below be-

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that construction would permit Title I claims for "relief for violations that occur during the election, such as denial of access to the polling place or failure to provide a minority with ballots," 679 F.2d at 993. That court added that "[p]reresult judicial relief need not require a new election in all cases" and may, indeed, be "less disruptive than a new election," *id.* But this analysis simply perpetuates the basic flaw of the decision below by focusing exclusively on the timing of the suit and ignoring the substance of the relief being sought in determining whether the suit is precluded by § 403. A suit brought during the balloting to obtain, *e.g.*, "access to the polling place" is not a suit to "challeng[e] an election." But a suit filed during the balloting seeking to set aside the election and direct a new election is a suit to challenge an election and hence is precluded by § 403. *See also* Judge Campbell's dissenting opinion below, 679 F.2d at 1005; Comment, *Titles I & IV of the LMRDA: A Resolution of the Conflict of Remedies*, 42 U. Chi. L. Rev. 166 (1974); Note, *Pre-Election Remedies Under the Landrum-Griffin Act*, 74 Colum. L. Rev. 1105, 1123-24 (1974).

[6] S. Rep. No. 187, 86th Cong. 1st Sess., *reprinted in* I NLRB, Leg. Hist. of the LMRDA 417 [hereinafter cited as "Leg. Hist."].

[7] U.S. Department of Labor, *Legislative History of the LMRDA* at 839.

tween pre- and post-tabulation suits seeking to set aside an election.

(c) Finally, the construction of § 403 adopted below negates several judgments Congress made in enacting Title IV.

Title IV was carefully crafted by the Senate over a two-year period. A predecessor of Title IV had been contained in the Kennedy-Ives bill [8] which the Senate Labor Committee, after extensive hearings,[9] had reported to the Senate in 1958. That bill was amended and approved by the Senate [10] after a week-long debate, but was never taken up by the House.[11] In 1959, the Senate Labor Commitee, after holding additional hearings,[12] reported a new bill to the Senate,[13] with an election title largely following the Kennedy-Ives bill that the Senate had passed the previous year; [14] that title with only minor changes was enacted into law as Title IV. *See generally Trbovich v. Mine Workers, supra*, 404 U.S. at 533.

In framing Title IV Congress made the fundamental decision that only the Secretary of Labor would be em-

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[8] S. 3974, 85th Cong. 2d Sess. (1958).

[9] Sen. Comm. on Labor and Public Welfare, Subcommittee on Labor, Hearings on Union Financial and Administrative Practices and Procedures, 85th Cong. 2d Sess. (1958).

[10] 104 Cong. Rec. 11486-87.

[11] The Senate bill was not acted on by the House Education and Labor Committee. An extraordinary motion on the floor of the House to suspend its rules and pass the bill as approved by the Senate without committee action failed. *Id.* at 18287-88.

[12] Sen. Comm. on Labor and Public Welfare, Subcommittee on Labor, Hearings on Labor Management Reform Legislation, 86th Cong. 1st Sess. (1959).

[13] S. 1555, 86th Cong. 1st Sess. (1959).

[14] *See* Cox, *Internal Affairs of Labor Unions Under the Labor Relations Act of 1959*, 58 Mich. L. Rev. 819, 822 (1960).

powered to sue to set aside a union election, rejecting a bill supported by the Eisenhower administration that would have authorized private suits as well.[15] As this Court explained in *Trbovich v. Mine Workers, supra*:

> A review of the legislative history shows that Congress made suit by the Secretary the exclusive post-election remedy for two principal reasons: (1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections; and (2) to centralize in a single proceeding such litigation as might be warranted with respect to a single election.
>
> • • •
>
> Congress intended to prevent members from pressing claims not thought meritorious by the Secretary and from litigating in forums or at times different from those chosen by the Secretary. [404 U.S. at 532, 536]

In addition, in framing the § 402 remedy, Congress made two other subsidiary judgments of relevance here. First, in § 402(a) Congress resolved as follows the question of who should govern a union during the pendency of a challenge to the union's election:

> The challenged election shall be presumed valid pending a final decision thereon . . . *and in the interim the affairs of the organization shall be conducted by the officers elected* or in such other manner as its constitution and bylaws may provide.[16]

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[15] S. 748, 86th Cong. 1st Sess., in I Leg. Hist. 84. The pertinent legislative history is summarized in *Trbovich v. Mine Workers, supra*, 404 U.S. at 533-36.

[16] The Senate Committee explained:

> Since union business must not be brought to a standstill whenever an election is challenged, it is necessary to make some provision for the conduct of business while the proceeding is in progress . . . The choice lay between keeping the old officers in office or allowing the new officers to enter upon their duties

Second, in § 402(c) Congress specified the remedy to be afforded upon proof that a violation of Title IV "may have affected the outcome of an election" by providing:

> the court shall declare the election . . . to be void and direct the conduct of a new election *under supervision of the Secretary* and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization.

As this Court has explained, "Congress chose the alternative of a supervised election as the remedy for a [Title IV] violation in the belief that the protective presence of a neutral Secretary of Labor would best prevent the unfairness in the first election from infecting, directly or indirectly, the remedial election." *Wirtz v. Bottle Blowers Ass'n*, *supra*, 389 U.S. at 474.

The decision below, in permitting courts to entertain private suits to set aside union elections so long as the last ballot in the election has not been counted, runs directly contrary to each of these congressional judgments.

First and most obviously, the decision below denies unions the special protections Congress sought to provide with respect to suits challenging a union election. Under that decision, union members are able to bypass "the screening function assigned by statute to the Secretary," *Trbovich*, *supra*, 404 U.S. at 537, so long as they commence their action to set aside a union election before the last ballot is counted. And under the decision below, until the last ballot is counted, a union may be subjected to multiple suits challenging its election in forums and at times different from those chosen by the Secretary.

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even though their right may still be challenged. *The latter course seems preferable.* . . . There would be the least disruption of normal procedure within the union if they [the newly-elected officers] were continued in office. However, the ultimate decisions upon this point should be made by the labor unions themselves. [I Leg. Hist. at 418]

Second, by holding that in a private suit jurisdiction to set aside an election exists until the last ballot is counted, the decision below effectively requires a district court in an action of this type to do what the district court did here: enjoin the tabulation of the ballots and thereby leave the incumbent officers in office *pendente lite*—in this case for one full year. This result runs directly contrary to Congress' decision that, *pendente lite*, "the affairs of the organization shall be conducted by the officers elected" (*see* p. 10 *supra*).

Third, by holding that in a private lawsuit a court is authorized to order a new election, the decision below necessarily approves a remedy for an election violation other than the one Congress chose. In a private lawsuit, the Secretary of Labor is not available to supervise the rerun election; rather, as occurred here, the district court must attempt that task itself, without the benefit of the Secretary's expertise.[17] This flies in the face of Congress' judgment that where a rerun elections is necessary the "only assurance that new officers do in fact hold office by reason of a truly fair and democratic vote is to do what the Act requires, rerun the election under the Secretary's supervision." *Wirtz v. Bottle Blowers Ass'n*, *supra*, 389 U.S. at 475.[18]

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[17] The district court's order here appointed the Honest Ballot Association and Lawrence Katz, Esq., as election supervisors and required the union to bear their costs.

The district court also included in its order various rules and regulations to govern the rerun election. In so doing, the district court discarded yet another judgment Congress made in enacting Title IV: rerun elections are to be held "so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization." LMRDA § 402(c), 29 U.S.C. § 482(c).

[18] *See also* Judge Campbell's dissenting opinion: "[I]t makes little sense for there to be two potential rerun formats, the choice to depend on the fortuity whether the first election is invalidated before or after its completion." 679 F.2d at 1005.

For all these reasons, the conclusion is inescapable that in enacting § 403 Congress intended to protect the exclusivity of the procedure fashioned in the LMRDA for setting aside a union election and thus, as this Court stated without qualification in *Trbovich*, to "prohibit[] union members from initiating a private suit to set aside an election." 404 U.S. at 531. The line the court below drew between pre-tabulation and post-tabulation suits is not the line Congress established in § 403. Thus, unless Congress, in enacting Title I of the LMRDA, intended to adopt a special rule of preclusion for suits under that Title, the decision below must be reversed.

B. Title I of the LMRDA establishes a "Bill of Rights of Members of Labor Organizations." That title was "designed to promote the 'full and active participation by the rank and file in the affairs of the union,'" *Hall v. Cole*, 412 U.S. 1, 7 (1973), including, but not limited to, the union's electoral affairs. To the extent Title I's "[e]qual rights" and "[f]reedom of speech and assembly" provisions (LMRDA § 101(a)(1), (2), 29 U.S.C. § 411(a)(1), (2)) apply to union elections, those provisions overlap with the provision of Title IV which secures to union members the right to nominate, support and vote for candidates of their choice (LMRDA § 401(e), 29 U.S.C. § 481(e)). *See* n.1, p. 4 *supra*.

Section 102 of Title I, 29 U.S.C. § 412, provides for private enforcement of that Title, authorizing private suits for "such relief (including injunctions) as may be appropriate." There is nothing in the language of § 102 to suggest that Congress intended a different preclusion rule to apply to actions to set aside a union election under that section than apply to all other actions seeking such relief. Nor is there anything in logic to suggest that Congress, having created in Title IV the procedure deemed appropriate for suits to set aside elections, would have decided to authorize an entirely different proce-

dure with a different remedy in Title I. And the legislative history of Title I makes clear that Congress cannot be assumed to have so decided *sub silentio*.

As previously noted, Title I was added to the LMRDA by virtue of an amendment introduced on the floor of the Senate. As originally framed by Senator McClellan, the author of the amendment, Title I actions were to be enforced by the Secretary of Labor, *see* II Leg. Hist. 1102. Thus no issue as to the preclusive effect of § 403 on Title I actions could have arisen under the McClellan amendment.

The McClellan amendment passed the Senate by a one-vote margin. *Id.* 1119. Two days later, however—shortly before the entire bill was approved by the Senate—the Senate adopted as a substitute for the McClellan amendment an amendment introduced by Senator Kuchel. *Id.* 1239. It was the Kuchel amendment that provided for private enforcement of Title I.

It is not entirely clear why the Kuchel amendment changed Title I's mode of enforcement. Senator Clark, a cosponsor of the amendment, stated that the sponsors' intent was to "take[] the Federal bureaucracy out of this bill of rights," *id.* 1233. This same philosophy was expressed by Senator Kefauver who "congratulate[d] the sponsors" for altering the McClellan amendment as that amendment "would [have] put the Secretary of Labor in the middle of the actions of every labor union in the United States and give[n] him the right to institute suits at his will," *id.* at 1238. But Professor Cox, who was an advisor to Senator Kennedy (the floor manager of the entire bill) during the Senate debates, has offered a somewhat different report on what transpired between the passage of the McClellan and Kuchel amendments:

> [S]trong sentiment for modification [of the McClellan amendment] immediately sprang up not only among its opponents but also in the ranks of South-

> ern supporters who came to realize that the authorization of governmental suits for injunction to enforce private rights would be an embarrassing precedent in future debates over civil rights legislation.[19]

This explanation is buttressed by statements made during the Senate debates by Senator Goldwater, an opponent of the Kuchel Amendment, indicating a willingness to "see stricken from the McClellan amendment those provisions of which our southern friends were fearful." II Leg. Hist. at 1238. And indeed, as Professor Aaron has noted, "[i]t is significant that all southern senators, including McClellan, voted for the Kuchel amendment." [20]

Regardless of whether the Kuchel amendment's change in Title I's enforcement mechanism was primarily a reflection of concern over undue governmental intrusion into union affairs or a concern over the precedent being set for civil rights matters, at least this much is clear: the Kuchel amendment was not intended to undo the preclusion rule of § 403 or to create a new means for overturning union elections. Indeed, there is not one iota of evidence suggesting such an intent on the Senate's part in adopting the amendment.

Nor can such an intent be attributed to the House of Representatives. The Kuchel amendment's enforcement provisions were adopted, in substance, in the three separate bills that were submitted to the House for consideration: the Elliott bill, *see* I Leg. Hist. 687; the Shelley bill, *see, id.* 865; and the Landrum-Griffin bill, *see id.* at 619. Because of the consensus on this point, the House did not focus on the enforcement issue in general or on the relationship between the Title I and

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[19] Cox, *supra*, n. 14, at 832-33. During the course of the debate on the McClellan amendment, opponents had raised this very point in an attempt to sway southern senators to oppose the amendment. *See* II Leg. Hist. at 1110-13; *see also id.* at 1123 (Sen. Johnson).

[20] Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 851, 859 (1960).

Title IV enforcement schemes in particular. The House debate thus adds nothing to understanding Congress' intent.

There is, then, no basis for concluding that Congress intended in Title I to undo what had been done in Title IV and to create an alternative means for setting aside an election, one in which the Secretary of Labor would not play a role in screening complaints or in supervising the rerun election. Thus, § 403 precludes Title I suits seeking to set aside union elections just as § 403 precludes state-law suits seeking that relief. Accordingly, the district court lacked the authority to grant the relief that was granted here.

II. EVEN IF TITLE IV DOES NOT PRECLUDE A COURT IN A PRIVATE ACTION UNDER TITLE I FROM ISSUING AN ORDER SUCH AS THE ONE ISSUED HERE, TRADITIONAL EQUITABLE PRINCIPLES DICTATE AGAINST THE EXERCISE OF SUCH AUTHORITY.

If the Court were to conclude, contrary to our showing in Part I, that Title IV does not preclude a court in a private action under Title I from enjoining the counting of the ballots cast in a union election, setting aside the election and directing a new election at a later date, the Court would then be faced with the question whether the district court appropriately exercised that equitable authority in this case. As we now show, that question must be answered in the negative, for traditional equitable principles which are applicable in § 102 suits counsel strongly against the exercise of that authority.

Just last Term, in *Weinberger v. Romero-Barcelo*, —— U.S. ——, 102 S.Ct. 1798 (1982), this Court had occasion to review the principles that determine whether "the extraordinary remedy of injunction" should issue. *Id.* at 1803. The Court there emphasized that an injunction " 'is not a remedy which issues as of course' "; "[t]he grant of jurisdiction to insure compliance with

a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Id.* at 1802, 1803. Rather,

> An injunction should issue only where the intervention of a court of equity "is essential in order effectually to protect property rights against injuries otherwise irremediable." The Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies.
>
> Where plaintiff and defendant present competing claims of injury, the traditional function of equity has been to arrive at a "nice adjustment and reconciliation" between the competing claims. In such cases, the court "balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction." [*Id.* at 1803; citations omitted]

These principles, the *Weinberger* Court noted, "'reflect a practice with a background of several hundred years of history,' a practice of which Congress is assuredly well aware." *Id.* Thus, although "Congress may intervene and guide or control the exercise of the courts' discretion . . . we do not lightly assume that Congress has intended to depart from established principles," and those principles "'should not be yielded to light inferences, or doubtful construction.'" *Id.* at 1803-04.

In this case, there is nothing to suggest that in enacting § 102 Congress intended to depart from those established principles. The language of the section—authorizing courts to grant "such relief (including injunctions) as may be appropriate"—is cast in broad and general terms; "[i]f anything, § 102 contemplates that damages will be the usual, and injunctions the extraordinary form of relief," *Boilermakers v. Hardeman*, 401 U.S. 233, 240 (1971). And the legislative history contains

"numerous expressions by sponsors and other supporters of the Act indicating that § 102 was intended to afford the courts a wide latitude to grant relief according to 'the necessities of the case' and 'to give such relief as [the court] deems equitable under all the circumstances.'" *Hall v. Cole, supra*, 412 U.S. at 13. Thus, in Title I cases the courts are to adhere to the historic principles and practices of equity.

Applied to the election context, these traditional equitable principles counsel against the issuance of an injunction which sets aside a union election or which postpones the date of the election. This is true for several reasons.

First, equity has long been virtually unwilling to enjoin public elections. As stated in 4 Pomeroy, *Equity Jurisprudence*, § 1754 (4th ed.):

> An injunction will not issue, as a general rule for the purpose of restraining the holding of an election, or of directing or controlling the mode in which, or determining the rules of law in pursuance of which, an election shall be held.

Similarly, so far as we have been able to determine, injunctions against union elections prior (and subsequent) to the enactment of the LMRDA were rare occurrences.[21]

There is nothing in § 102's legislative history stating an intent to depart from this longstanding rule of equity.

Second, the reasons which have led courts of equity to be unwilling to enjoin public elections apply equally to

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[21] In *Caliendo v. McFarland*, 175 N.Y.S.2d 869 (Sup. Ct. 1958), the court enjoined a special union meeting to elect union stewards. In *Litwin v. Novak*, 9 App. Div. 2d 789, 193 N.Y.S.2d 310 (1959) and *Daley v. Stickel*, 169 App. Div. 155, 153 N.Y.S.2d 886 (1956), the courts enjoined *rerun* elections that the unions in those cases had decided to conduct, requiring the unions in those cases to adhere to the results of the original election *pendente lite*. Our research has disclosed no other pre-1959 instances of such relief.

union elections. As Chief Justice Warren stated in refusing (in his capacity as Circuit Justice) to enjoin a union election, such an injunction "would call for an extraordinary exercise of judicial power that only the most compelling considerations could warrant." *Teamsters v. Cunsningham*, 40 L.R.R.M. 265 (U.S. 1957).

Such an injunction leaves the union to be run for some period of time—in this case for a full year—by officers whose terms and democratic mandate have expired. This means that the union is run by officers with no claim to legitimacy but a court order maintaining those officers in their positions. (In contrast, during the pendency of a Title IV suit the union is run by *elected* officers—albeit officers whose legitimacy is being challenged.)

Moreover, an injunction against an election interjects the judiciary into the proverbial political thicket. The timing of an election is often a critical determinant of the outcome of the election; voter sentiment often shifts from time to time during an election campaign depending upon the campaign successes and failures of the candidates or upon external events of importance to the voters.[22] Indeed, the very fact that a candidate is successful in obtaining an injunction may in and of itself boost his campaign, enabling him to herald his success and to use the court's findings to attack those who opposed the injunction. Thus a court, by issuing an injunction that

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[22] For example, both the 1968 and 1976 presidential election campaigns saw candidates who started far behind in the polls (Hubert Humphrey and Gerald Ford) make large gains during the course of the campaign; had those elections been postponed for even a week or two, the results might have been different. *See* M. Schram, *Running for President*, 366 (1977). Similarly, in 1968 and in 1980, major events occurred shortly before the election—in 1968, President Johnson's announcement of a halt to the bombing of North Vietnam and in 1980, the apparent breakdown of negotiations to free the hostages in Iran. A postponement of the election might have dissipated the effects of those events and aided the candidates who were disadvantaged by them. *See* T. White, *The Making of the President, 1968*, at 447 (1969); J. Germond & J. Witcover, *Blue Smoke and Mirrors*, 297, 312, 319 (1981).

postpones the date of the election, is more likely than not to affect the results of the election.

Precisely because of the effect that an injunction against an election may have on the eventual outcome of that election, were such relief to be made available, federal court injunctions would become an important weapon in the campaign arsenal of every candidate for union office. A candidate who believed, pre-election, that he was trailing but that his candidacy was gaining momentum (or that his opponent's candidacy was fading) would have every incentive to seek a judicial order defering the election date. The federal courts would thus find themselves squarely in the midst of a political quagmire.

Finally and perhaps most importantly, although "the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies," (p. 16, *supra*), an injunction against an election can rarely (if ever) be justified on this basis. As this Court has held, "[i]nadequacy of remedy and irreparable harm are practical terms. . . . As such, their existence today must be determined . . . in the light of the remedies now available. . . ." *Beacon Theatres v. Westover*, 359 U.S. 500, 507 (1959). And under Title IV of the LMRDA there is "now available" the congressionally-crafted post-election remedy to challenge an election that was tainted by illegalities.[23] Thus, the indispensable requisites for equitable relief—irreparable injury and inadequancy of legal remedies—ordinarily will be lacking in a suit seeking to enjoin a union election.[24]

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[23] Indeed, in this case, the district court issued a temporary restraining order not to prevent irreparable harm but to "preserve . . . its jurisdiction" and thereby *defeat* (or at least defer) the availability of the Title IV remedy (*see* pp. 5-6, *supra*).

[24] *See also Meyer v. Bottone*, 459 Pa. 217, A.2d 328, 166, 167 (1974), in which the Pennsylvania Supreme Court refused to enjoin a union election stating:

> While the state and federal courts have concurrent jurisdiction *prior* to an election, in view of the clearly adequate federal

Indeed, in *Oden v. Brittain*, 396 U.S. 1210 (1969), Justice Black, as a Circuit Justice, refused to enjoin a public election precisely because of the availability of post-election relief. Justice Black explained: "If this election were held, applicants could later bring suit to have it set aside," and thus "the election cannot result in the severe irreparable harm necessary to justify the issuance of the extraordinary remedy of an injunction by an individual Justice." *Id.* at 1211. The same is true with respect to union elections: because of the availability of the Title IV post-election remedy, a union election ordinarily "cannot result in the severe irreparable harm necessary to justify the issuance of the extraordinary remedy of an injunction" by an individual district court judge.[25]

In light of the foregoing, it is difficult for us to envision circumstances in which it would be appropriate for a court of equity to enjoin an election. But it is neither necessary nor appropriate for the Court to decide here whether a "genuinely extraordinary situation," *Sampson v. Murray*, 415 U.S. 61, 92 n.68 (1974), could arise in which such relief would be appropriate. It is enough that there is nothing about this case that is sufficient to overcome the force of the equitable constraints just discussed. Accordingly, the district court erred here in granting an injunction which prevented the counting of the ballots cast in a union election, set aside that election, and directed a new election at a later date.

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remedy *post* election our state courts, in a case such as this, should refrain from exercising their jurisdiction. [emphasis in original; citations omitted]

[25] Except where, as here, the candidate seeking to enjoin the election has been denied a place on the ballot, pre-election equitable intervention would not be justified for yet another reason: the party seeking the injunction may win the election, in which case there would be no need for judicial intervention at all.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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No. 82-432

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

LOCAL No. 82, FURNITURE AND PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN, AND PACKERS; BART GRIFFITHS, SECRETARY-TREASURER, LOCAL No. 82; GEORGE HARRIS, PRESIDENT, LOCAL No. 82; PHILLIP PIEMONTESSE, CHAIRMAN, LOCAL No. 82 ELECTION COMMITTEE; and JOHN DOE, JAMES DOE, and JEROME DOE, MEMBERS OF THE ELECTION COMMITTEE OF LOCAL No. 82,

Petitioners,

and,

RAYMOND DONOVAN, SECRETARY OF LABOR,

Intervenor,

v.

JEROME CROWLEY, ANTHONY COYNE, JOSEPH FAHEY, ROBERT LUNNIN, JAMES HAYES, GERALD OWENS, JOHN LYNCH, JOSEPH TRASK, JOSEPH MONTAGNA, and DENNIS BATES,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the First Circuit

MOTION OF ASSOCIATION FOR UNION DEMOCRACY FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF, AND BRIEF IN SUPPORT OF RESPONDENTS

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July 27, 1983

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-432

LOCAL No. 82, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, *et al.*,

Petitioners,

and,

RAYMOND DONOVAN, SECRETARY OF LABOR,
Intervenor,

v.

JEROME CROWLEY, *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the First Circuit

MOTION OF ASSOCIATION FOR UNION DEMOCRACY FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

The Association for Union Democracy ("AUD") respectfully moves this Court, pursuant to Rule 36.3, for leave to file a brief as amicus curiae in support of the respondents. Consent to file this brief was granted by the intervenor and respondents, but withheld by the petitioners.

The Association for Union Democracy is a tax exempt, New York corporation which was classified as a non-private foundation in 1971 by the Internal Revenue Service. The Association's primary objective, as its name suggests, is to promote democratic principles and practices in American labor organizations, both by encouraging union members to participate actively in the internal affairs of unions, and by protecting the exercise of democratic rights within unions. The Association was founded in the realization that no other organization devotes itself primarily to this objective.

The Association does not take sides in internal union disputes over policies, programs, or candidates. It does, however, propose that the rivalries and antagonisms which arise in the labor movement, as in other social institutions, be resolved through democratic procedures and the due process of law.

The sponsors of the Association include a broad cross section of citizens, including many union members, educators, religious leaders, lawyers, students and supporters of the union movement. They share the view that the labor movement is one of the forces in our pluralistic society which helps to sustain democracy in our national life and that, if it is to serve this purpose, union leaders must be responsive to their members, and unions must be democratic and just in their internal life.

Over the 15 years of its existence, the Association has accumulated a wealth of knowledge and insight concerning the difficulties many union members encounter when attempting to exercise democratic rights within their unions. In its brief, the Association will share these insights and advocate a more expansive position than the one adopted by the court of appeals. Because respondents will presumably defend the decision below, this position

would not otherwise be presented for the Court's consideration.

Respectfully submitted,

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July 27, 1983

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-432

LOCAL No. 82, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, *et al.*,

Petitioners,

and,

RAYMOND DONOVAN, SECRETARY OF LABOR,

Intervenor,

v.

JEROME CROWLEY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE ASSOCIATION FOR UNION DEMOCRACY AS *AMICUS CURIAE*

INTEREST OF *AMICUS CURIAE*

The interests of *amicus curiae* are set forth at pages 1 to 3 of the foregoing motion for leave to file a brief.

SUMMARY OF ARGUMENT

Although there is some overlap between the rights conferred upon union members in Titles I and IV, these rights do not compete with, but rather complement, one another. Rather, the tension between the two Titles arises in their very different enforcement schemes. Although

some early decisions held that where there was an overlap, *Calhoon v. Harvey*, 379 U.S. 134 (1964), required the courts to withhold, or substantially limit, their jurisdiction to remedy Title I violations, the great weight of more recent authority, including the decision below, has properly held that Title IV does not preempt the courts' jurisdiction under Title I.

The key to resolving the tension lies in recognition of the limitation of section 403 of Title IV which declares that the "exclusive" remedy for violations of that Title shall be the invalidation of elections "already conducted." 29 U.S.C. § 483. After that language was reported out of committee, Title I, together with its own enforcement scheme, was added to the bill in order to enhance the democratic rights and remedies of union members which the legislators found to be insufficiently protected in the committee bill. Unlike Title IV, where only one remedy is available and only under certain circumstances, Title I confers upon district courts broad authority to fashion "such relief (including injunctions) as may be appropriate." 29 U.S.C. § 412.

Although Congress did not explicitly consider the interplay of the remedial schemes in the two Titles, there can be little doubt that the courts may not remedy a Title I violation by invalidating an election "already conducted," and ordering a new election. However, that is the only form of relief that would be barred as an "inappropriate" means of remedying Title I violations. Thus, petitioners' claim that district courts have no jurisdiction to remedy Title I violations that occur in an election context, or may affect an election, must be rejected. And in this case, the district court did not exceed his discretion when fashioning relief for the union's violation of members' Title I rights to nominate and vote for candidates of their choice by freezing an ongoing election and obtaining the union's consent to run a fair election without offending its members' Title I rights.

ARGUMENT

IN PROTECTING UNION MEMBERS' TITLE I RIGHTS WHICH MAY OVERLAP TITLE IV RIGHTS, THE ONLY REMEDY NOT AVAILABLE TO A TITLE I COURT IS THE "EXCLUSIVE" TITLE IV REMEDY.

Introduction

The primary issue decided below was "whether the district court had jurisdiction under Title I of the LMRDA . . . or whether . . . the plaintiffs' only recourse was to the Secretary of Labor under Title IV of the Act." Pet. App. 42-59. The court below found that, despite the overlap of substantive rights in Titles I and IV, it had jurisdiction over the respondents' action, a holding which is directly challenged in this Court only by petitioners, not by the Secretary of Labor or the *amicus,* AFL-CIO.

The thrust of petitioners' argument is that Congress intended to preclude any intrusion by the courts into union elections except after they had been conducted, and then only in suits brought by the Secretary of Labor to set aside the election. According to petitioners, the enforcement scheme in Title IV preempts courts from hearing, or at least from remedying, Title I violations that occur during, or at least relate to, union elections. Although the Secretary and the AFL-CIO do ultimately concede in a backhanded manner that federal courts have jurisdiction over Title I actions regardless of the pendency of elections, they suggest that the courts' injunctive authority is, for all intents and purposes, substantially limited despite very clear language in Title I authorizing courts to award "such relief (including injunctions) as may be appropriate." 29 U.S.C. § 412.

This brief will demonstrate that this broad ranging view of the preemptive effect of Title IV, which is based upon

Calhoon v. Harvey, supra, is incorrect. To do so, it is necessary first to review the language and legislative history of Titles I and IV before discussing *Calhoon* and suggesting an appropriate means of resolving the tension between the enforcement schemes in the two Titles.

The Provisions In Titles I and IV Creating The Tension

In Title IV, the Congress set out many procedural rules to govern union elections. Among the rules imposed by section 401 is an obligation to have periodic, secret ballot elections, to refrain from using union funds to promote candidacies, to distribute campaign literature at a candidate's expense, and to permit all candidates to have poll watchers. The section also contains the following language which was subsequently echoed in the Title I Bill of Rights when it was appended to the statute just prior to enactment:

> In any election...a reasonable opportunity shall be given for the nomination of candidates and every member in good standing...shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind...Sec. 401(e), 29 U.S.C. § 481(e).

In contrast to the specific delineation of rights and procedures in Title IV, Title I was written more generally and modeled after the Bill of Rights in the U.S. Constitution. *United Steelworkers of America v. Sadlowski,* 457 U.S. 102, 111 (1982). For example, it extends to union members' due process protections, the right to set their own dues levels, and to initiate legal actions against their unions. Also contained in Title I are the following rights which overlap similar rights in Title IV:

> Every member of a labor organization shall have equal rights and privileges...to nominate candidates,

> to vote in elections or referendums...Sec. 101(a)(1), 29 U.S.C. § 401(a)(1).
>
> Every member of a labor organization shall have the right...to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in any election of the labor organization or upon any business properly before the meeting...Sec. 101(a)(2), 29 U.S.C. § 401(a)(2).

Thus, when members engage in the process of nominating candidates for office, expressing their views on candidates and voting — at least in elections for officers as opposed to referenda on such matters as dues increases, bylaw amendments or contract ratifications — their conduct may be protected by both Titles I and IV.

The tension in the law stems from the very different enforcement schemes adopted by the Congress for remedying violations of the two Titles. Congress gave union members the right to initiate suits to vindicate their Title I rights and authorized courts to award "such relief (including injunctions) as may be appropriate." No limitations were placed upon when Title I suits could be brought; nor were any limitations directly imposed upon the type of remedies that could be awarded. *See* section 102, 29 U.S.C. § 412.

In contrast, the Congress elected in Title IV not to remedy every violation of the Title IV election requirements. Only when violations may actually have affected the outcome of an election did the Congress conclude that the entire election should be set aside, and a new election run under the supervision of the Secretary of Labor. And, to shield unions from frivolous suits, the Congress delegated to the Secretary a screening function and the exclusive authority to initiate suits under Title IV to set aside elections. *See* section 402(b) and (c), 29 U.S.C. § 482(b) and (c).

The problem arises if a federal court concludes that the best way to vindicate members' Title I rights infringed during a union election would be to set aside the election after it had been completed and require the union to conduct a new election. But that option would appear to be foreclosed whenever the election is one governed by Title IV since Congress declared that "[t]he remedy provided by [that] title for challenging an election already conducted shall be exclusive." Section 403, 29 U.S.C. § 483. What is less certain is whether, as petitioners contend, this language was intended to preempt Title I entirely in any matter touching on union elections or whether it simply confines the remedies available for Title I violations. And if a Title I court may award relief which affects union elections, what are the boundaries upon either the timing or the substance of the relief? To answer these questions, the legislative history of the two Titles must be examined.

The Relevant Legislative History of Titles I and IV

When enacting the LMRDA, the Congress declared that its recent investigations of unions had disclosed

> a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation....

Section 2(b), LMRDA, 29 U.S.C. § 401(b). Senator McClellan put it more bluntly. "The situation is sickening," he said, "hoodlums and racketeers" have "infiltrated certain unions." 105 Cong. Rec. 5806 (1959), II Leg. Hist. 1098.[1] Expressing Congressional sentiment, he proclaimed:

> If unions are to have such federally bestowed, tremendous powers in industrial government, they

[1] "Leg. Hist." refers to the *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, the two volume edition compiled by the National Labor Relations Board.

> should be compelled by law to represent their members in accordance with democratic principles and to accord to them the basic rights of liberty, freedom, and justice.
>
> * * * * *
>
> I do not believe that unions in our society are supposed to be, or that they should be, permitted to be the masters of the members. Unions should be the servants.

Id. at 5806-07.

The statute was constructed over a lengthy period bridging two different sessions of Congress. It was "the product of conflict and compromise between strongly held and opposed views." *Wirtz v. Glass Bottle Blowers Ass'n,* 389 U.S. 463, 468 (1968). As a result, Professor Archibald Cox, "a principal consultant to the draftsmen,"[2] cautioned:

> The legislation contains more than its share of problems for judicial interpretation because much of the bill was written on the floor of the Senate or House of Representatives and because many sections contain calculated ambiguities or political compromises essential to secure a majority. Consequently, in resolving them the courts would be well advised to seek out the underlying rationale without placing great emphasis upon close construction of words.

Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959,* 58 Mich. L. Rev. 819, 852 (1960). Whatever else may be said, it cannot be disputed that the overriding Congressional objective when enacting the LMRDA was to guarantee that all unions would be democratic institutions and thus to enable members to oust corrupt officials and govern themselves.

Unfortunately, the petitioners and their supporters often lose sight of this overriding goal by focusing upon a

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[2] *Trbovich v. United Mine Workers,* 404 U.S. 528, 535 (1972).

few individual trees in the legislative forest. For example, there is no want of legislative history reflecting the solicitude of the principal draftsmen of the LMRDA for unions' need to avoid unnecessary government intrusion in their internal affairs.[3] The Title IV election provisions were the product of such concern, and they were enacted as drafted. However, in the final analysis this aspect of the legislative history is misleading because it is incomplete.

As originally drafted in S. 505, which was introduced by Senator Kennedy on January 20, 1959, the election provisions would have preempted all preexisting rights and remedies available to union members under state law. I Leg. Hist. 64-65, § 303. However, when the bill was reported out of committee on April 14, 1959 as S. 1555, it contained new language which provided that "[e]xisting rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this title." *Id.* at 378, § 303. Nonetheless, the full Senate was dissatisfied; it believed that even this bill did not go far enough to assure democratic processes within unions. As this Court recently recognized in *Steelworkers v. Sadlowski, supra,* 457 U.S. at 109, 112:

> Senator McClellan and other legislators feared that the bill did not go far enough because it did not provide general protection to union members who spoke out against the union leader ship. * * * Congress also recognized that this freedom is particularly critical, and deserves vigorous protection, in the context of elections.

Accordingly, Senator McClellan offered a "Bill of Rights of Members of Labor Organizations" in the form

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[3]For example, Senator Kennedy, the principal author, was concerned "that only essential standards should be imposed by legislation . . . [and] great care should be taken not to undermine union self-government." S. Rep. No. 187, 86th Cong., 1st Sess., p.7 (1959).

of a floor amendment which was adopted on April 22nd by a vote of 47 to 46. Like the election provisions, his amendment delegated to the Secretary of Labor the authority for initiating enforcement actions. However, despite the Senate's concern for protecting union members' basic civil liberties,"strong sentiment for modification [of the McClellan bill of rights] immediately sprang up."[4] During the next two days a compromise was drafted and introduced by Senator Kuchel in the form of a substitute amendment which was adopted by an overwhelming margin of 77 to 14. 105 Cong. Rec. 5997-98, 6030 (1959), II Leg. Hist. 1220-21, 1239.

During the floor debate on his amendment, Senator Kuchel pointed out "one of the major changes in the proposal":

> The amendment of the Senator from Arkansas provided that the Secretary of Labor might, on behalf of the injured or aggrieved member, have the right to litigate the alleged grievance and to seek an injunction or other relief. We believe that giving this type of right to the aggrieved employee member himself is in the interest of justice, and therefore we propose to eliminate from the bill the right of the Secretary of Labor to sue in his behalf.

105 Cong. Rec. 6023 (1959), II Leg. Hist. 1232. Senator Clark, a participant in drafting the amendment, explained the modification more poignantly: "it takes the Federal bureaucracy out of this bill of rights and leaves its enforcement to union members, aided by the courts." 105 Cong. Rec. 6024 (1959), II Leg. Hist. 1233. Senator Kefauver congratulated the sponsors for removing the Secretary of Labor from "the middle of the actions of every labor union in the United States." 105 Cong. Rec. 6029 (1959),

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[4]Cox, *Internal Affairs of Labor Unions Under The Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 832-33 (1960).

II Leg. Hist. 1238. Thus, even though there is an overlap between Titles I and IV, by giving members direct access to the courts, and by giving courts broad discretion to award "such relief (including injunctions) as may be appropriate," Congress could only have intended to strengthen what it considered to be the inadequacies in Title IV. *See Steelworkers v. Sadlowski, supra,* 457 U.S. at 117 n. 10.

Indeed, in *Hall v. Cole,* 412 U.S. 1 (1973), the Court considered the question of remedies available under Title I. The court noted that the other LMRDA Titles

> deal with narrowly defined problems under the Act, and specifically authorize...limited remedies...By contrast § 102 was premised upon the fact that Title I litigation necessarily demands that remedies "be tailored to fit facts and circumstances admitting of almost infinite variety," and § 102 was therefore cast as a broad mandate to the courts to fashion"appropriate relief." Indeed, any attempt on the part of Congress to spell out all the remedies available under § 102 would create the "danger that those [remedies] not listed might be proscribed with the result that the courts would be fettered in their efforts to 'grant relief according to the necessities of the case.' "

Id. at 10-11 (citations and footnotes omitted).

The legislative history of Title I and its remedial scheme does not reflect Congressional concern for protecting unions from litigation.[5] It does not reflect solicitude for

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[5]Each of the LMRDA's different titles contain their own, very different enforcement schemes. In addition to the differences between the Title I and IV schemes already discussed, it should be noted that there is a mandatory exhaustion period of 90 days in Title IV, and a permissive exhaustion period of 120 days in Title I. *See Detroy v. Am. Guild of Variety Artists,* 286 F.2d 75 (2d Cir.), *cert. denied,* 366 U.S. 929 (1961). The Title II reporting and disclosure provisions are enforced primarily by the Secre tary, but members can also sue to require that their unions make available for inspection their financial

the Secretary's expertise in recognizing, screening, or remedying Title I violations, particularly with the one blunt instrument made available by Title IV.[6] On the contrary, it reflects a very deliberate intention to expand the democratic rights of union members and to assure that they would be enforced, particularly in an electoral context when members' civil rights are most precious, and most likely to be infringed. *See Steelworkers v. Sadlowski, supra.*

Accordingly, petitioners place the cart before the horse to the extent they argue that greater weight should be assigned to the legislative history reflecting the draftsmen's objectives in Title IV than objectives of the full Senate when later adopting Title I, by an overwhelming majority, in order to enlarge the democratic protections found wanting in the committee bill. Whatever merit there may be to petitioners' claim that "Title I rights were [not] intended to be superior in importance to those set forth in Title IV," Pet. Br. at 25, there is no basis to suggest that the Congress intended them to be inferior, or that they should be even temporarily eclipsed by Title IV when infringed during an election season, except where Congress clearly and explicitly provided.

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records with the only apparent condition being demonstration of "just cause." *See* § 201(c), 29 U.S.C. § 431(c). Members may initiate litigation under Title III to lift trusteeships. *See* § 304, 29 U.S.C. § 464. Finally, Title V authorizes members to sue their union officers for breach of fiduciary duty; the only condition is that they must give the union an opportunity to initiate appropriate proceedings to remedy the breach. *See* § 501(b), 29 U.S.C. § 501(b); *Purcell v. Keane,* 406 F.2d 1195 (3d Cir. 1969).

[6] In *Wirtz v. Glass Bottle Blowers Ass'n,* 389 U.S. 463 (1968), the Court recognized that "no exceptions are admitted by the unambiguous wording [of § 402] that when 'the violation of § 401 may have affected the outcome of an election, the court *shall* declare the election, if any, to be void and direct the conduct of a new election under the supervision of the Secretary . . .' " *Id.* at 468 (emphasis in original).

***Calhoon* And Its Aftermath**

Shortly after enactment of the LMRDA, this Court decided *Calhoon v. Harvey*, 372 U.S. 134 (1964), a case initiated by a union member who alleged that his union's constitution infringed his section 101(a)(1) right to nominate candidates because it provided that members could nominate only themselves. The Court concluded, however, that section 101(a)(1) only guaranteed members "equal rights" — it is "no more than a command that members and classes of members...not be discriminated against in their right to nominate and vote." *Id.* at 139. Because the suit sought to challenge the rule which had been uniformly applied to all members, the Court held that the lower court lacked jurisdiction under Title I. Once the Court found that the complaint had failed to state a cause of action under that section, that should have been the end of the matter. As it turned out, *Calhoon* did not involve an overlap between Titles I and IV.

Nonetheless, in the majority opinion, Justice Black went on to state that "Title IV, not Title I, sets standards for eligibility and qualifications of candidates and officials and provides its own separate and different administrative and judicial procedure for challenging those standards." *Id. at 138.* The opinion notes that Congress decided "to utilize the special knowledge and discretion of the Secretary of Labor," and "to allow unions great latitude in resolving their own internal controversies," and "not to permit individuals to block or delay union elections by filing federal-court suits for violations of Title IV." *Id.* at 140. Thus, *Calhoon* did not hold that whenever union conduct violates both Title I and Title IV, the courts are preempted from remedying the violation under Title I. To the contrary, the Court clearly held "that possible violations of Title IV...are not relevant in determining whether or not a district court has jurisdiction under § 102 of Title I of the Act." *Id.* at 139-40. However, in a concur-

ring opinion, Justice Stewart gave credence to this notion by suggesting that "by construing Title IV to foreclose absolutely pre-election litigation in the federal courts, the Court sharply reduces meaningful protection for many of the rights which Congress was so assiduous to create." *Id.* at 146.

Justice Stewart was not alone in reading the majority opinion as preempting district court jurisdiction under Title I whenever Title IV rights were also implicated. For example, in *Driscoll v. Operating Engineers Local 139,* 484 F.2d 682 (7th Cir. 1973), *cert. denied,* 415 U.S. 960 (1974), a union bylaw requiring candidates to file an anticommunist affidavit was challenged as violating both the free speech and equal protection provisions of Title I. Relying on *Calhoon,* the Seventh Circuit held that the Title I remedy was precluded because of the overlapping coverage of Title IV and hence that the complaint should be dismissed for want of jurisdiction as long as it "basically related" to a matter covered by Title IV. *Id.* at 686. The court concluded that "Congress mandated...that the Secretary of Labor act as a clearinghouse for any litigation concerning union election policies." 484 F.2d at 689.

The Second Circuit adopted a more moderate position in *Schonfeld v. Penza,* 477 F.2d 899 (2d Cir. 1973). Although it found that a would-be candidate could not challenge his removal from office, and consequential ineligibility to run for office, in a Title I suit, the court did find that "[w]hen the rights of free speech and of association — as opposed to the rights of voting and election — of union members are invaded by the actions of union officers, the requirement of initial appeal to the Secretary under Title IV is inapplicable." *Id.* at 903. However, out of deference to this Court's opinion in *Calhoon,* the court added:

> The competing values between Title I rights and Title IV procedural requirements are best reconciled, in

> our opinion, by limiting initial federal court intervention to cases where union action abridging both Title I and Title IV can be fairly said, as a result of established union history or articulated policy, to be part of a purposeful and deliberate attempt by union officials to suppress dissent within the union.

Id. at 904.

Other courts have been unconcerned about weighing "competing values." In *Depew v. Edminston*, 386 F.2d 710 (3d Cir. 1967), a case involving the section 101(a)(1) equal protection provision, the court held that it need only determine

> whether or not a union member has been discriminated against in one of the rights enumerated in § 101(a)(1). If such discrimination is present, a cause of action exists under § 101(a)(1) regardless of other claims [under Title IV]; absent such discrimination, the courts have no such jurisdiction.

Id. at 712. *See also Kupau v. Yamamoto*, 622 F.2d 449, 455 (9th Cir. 1980); *McNail v. Amalgamated Meat Cutters*, 549 F.2d 538, 540 (8th Cir. 1977). And, in the opinion below, the First Circuit adopted this approach and concluded that "the different purposes that Congress sought to have Titles I and IV serve do not require...that a federal district court be foreclosed from taking jurisdiction of a Title I claim in an election [context]...Title I rights are not rights as to which the Secretary has particular expertise, so it is unnecessary for him to perform a screening function." Pet. App. 59. Although the court held that the touchstone of a § 101(a)(1) violation was simple discrimination, it embraced the *Schonfeld* holding that only a "purposeful and deliberate" attempt by union officials to suppress dissent would state a § 101(a)(2) violation in an election context. Pet. App. 61.

It is the view of *amicus* that these broad readings of *Calhoon* are not justified. The result has been to withhold

or deny relief for Title I violations. The potential tension between Titles I and IV can be reconciled far less drastically than some lower courts have suggested and can be done in a manner which preserves Congress' intent to protect members' rights under Title I during elections as well as in other circumstances.

Resolution of the Tension

As we have already seen, Congress amended S. 1555 by adding Title I in order to augment both the rights and remedies available in that bill, including the provisions which ultimately became Title IV. If Title I has been violated, whether the violation is "purposeful and deliberate" or not, the violation must be remedied regardless of whether the conduct may also have violated Title IV.[7] In *Calhoon,* this Court observed that "Section 402 of Title IV...sets up an exclusive method for protecting Title IV rights." 372 U.S. at 140. It did not hold that the section was also intended to protect Title I rights. Title I contains its own, very separate enforcement scheme from which the Secretary of Labor was very deliberately exclud-

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[7]This point is grudgingly conceded in as inconspicuous a manner as possible by petitioners, the Secretary of Labor and the AFL-CIO. Petitioners contend that "the issue in this case is not whether a district court has any authority to remedy Title I violations in a pre-election context but, rather, whether that authority extends so far as to include ordering a union to rerun its election." Pet. Br. at 29. Implicit in this claim is the suggestion that Title I courts do have some authority to remedy violations at least in a pre-election context.

The Secretary of Labor acknowledges that "some election violations may contravene both Titles I and IV. In those circumstances, while some kinds of relief under Title I may be appropriate, a new election may be ordered only under Title IV." DOL Br. at 10.

Coming even closer to the mark, the AFL-CIO states that "Section 403 does not distinguish between suits brought before and suits brought after an election has been conducted. * * * Thus, for example, a [Title I] suit brought after all ballots have been tabulated and the result announced is not precluded by Title IV if the suit is one for damages on account of election-related misdeeds or is one to restrain misconduct from recurring in the future." AFL-CIO Br. at 6, n. 3.

ed.[8] It cannot be seriously contended that Congress intended the Title IV enforcement provisions to function to suspend, limit or deny federal court jurisdiction to remedy Title I violations whenever they occur, or whenever the relief is sought, whether pre-election, during an election, or post-election. Were the law otherwise, this Court might well have been without jurisdiction to have decided *Sadlowski.*[9]

At the outset, therefore, it is important to recognize that the tension between Titles I and IV does not affect the jurisdiction of Title I courts. The tension stems from the effect a Title I remedy may have upon an election governed by Title IV where the Congress declared that only the Secretary of Labor could sue to set aside elections. The problem is that the exclusive remedy available under Title IV — wholesale invalidation of an election — may be too much, too little, or too late to remedy a Title I violation; indeed, as the court noted below, it may not even be available unless the Title IV violations might have affected the outcome of the election. *See* Pet. App. 65-66. It can scarcely be said that this result was intended by Congress.

Some of the confusion can be traced to *Trbovich v. United Mine Workers,* 404 U.S. 528 (1972), where this Court noted that the reason the Congress declared that the post election remedy under Title IV was to be exclusive was to protect unions by screening out frivolous claims, and by consolidating in a single proceeding all meritorious

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[8]To the contrary, Congress deliberately exempted Title I violations from the Secretary's investigatory authority in section 601(a), 29 U.S.C. § 521(a).

[9]The Court expressly rejected the union's argument that the outsider contribution rule at issue need be considered solely under Title IV. It held that "even if the rule satisfies § 403, it must also satisfy Title I" which, the Court noted, was "adopted precisely because Congress feared that Titles II through VI did not provide sufficient protection to union members." 457 U.S. at 117-18 n. 10.

claims under that Title. *Id.* at 532.[10] However, this observation has no application in the Title I context where the Congress deliberately removed the Secretary from the enforcement scheme. Indeed, in *Trbovich*, the Court clarified that Title IV only "prohibits union members from initiating a private suit to set aside an election." *Id.* at 531. Although the Congress never directly dealt with the interplay between Titles I and IV,[11] and clearly intended only to preempt state courts from setting aside elections after they had been completed, it would be consistent with Congress' intention to extend this prohibition to post-election Title I courts as well.

Petitioners, however, go much further when they contend that Title IV was "the special 'vehicle' through which Congress sought to insure democracy in elections . . . [and] the exclusive federal remedy adopted by Congress to resolve disputes concerning elections of officers was for the union to conduct a supervised election." Pet. Br. at 25-26. This simply is not true. Even before Title I was conceived, Congress made specific allowance for pre-election suits. Section 401(c) of Title IV gives candidates (not members) a right to sue in federal district court to compel unions to honor their rights under that section, *e.g.*, to have their campaign literature distributed. 29 U.S.C. § 481(c). To enforce this right, it may be necessary for a court to postpone an election, or enjoin it until the union fulfills its statutory obligations.

Section 403 clarified that while the Title IV enforcement scheme was to be the exclusive means of challenging an election already conducted, "[e]xisting rights and

[10]Such screening is particularly appropriate given the high cost in dollars and uncertainty that would result if any disappointed candidate could sue to overturn elections.

[11]*See* Secretary's Br. at 13. For an excellent discussion of the legislative history, see Note, *Titles I & IV of the LMRDA: A Resolution of the Conflict of Remedies*, 42 Chic. L. Rev. 166, 175-179 (1974).

remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this title." 29 U.S.C. § 483. Thus, for example, prior to enactment of the LMRDA, even if a union constitution did not contain a reasonable election notice requirement, state courts would imply such a requirement. *See generally* Summers, *Judicial Regulation of Union Elections,* 70 Yale L. J. 1221 (1961). In remedying violations of constitutions and bylaws, whether explicit or implied, state courts frequently postponed the election or enjoined it until the violation was corrected. *Ibid.* In addition, a number of union constitutions require the election of officers at shorter intervals than required in the LMRDA. Were the union to refuse to comply with its constitution, Title IV would afford no apparent remedy. However, the members could sue in state court to compel an election. And, given the traditional equity powers of the court, particularized election procedures or court supervision of the election could be ordered, all without an impermissible invasion of the Secretary's exclusive jurisdiction under Title IV.[12]

So also might a federal court properly become involved in the electoral process after invalidating a trusteeship under Title III of the LMRDA. Such suits may be brought by members and, once again, the court might find it appropriate to impose special rules on the conduct of the election, or even to supervise the election, all without any participation by the Secretary, or invasion of the Secretary's authority under Title IV. *See, e.g., Schonfeld*

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[12]For example, Local 306 of the Moving Picture Machine Operators sheduled an interim election for its business manager on June 1, 1983, to be held at the union hall at a time when a segment of the membership could not attend and vote. By order of May 31st, U.S. District Judge Robert J. Ward ordered the union to postpone the election, and conduct it under the auspices of an impartial supervisor. *Dolan v. Local 306, Moving Picture Machine Operators,* (S.D.N.Y. No. 83-CIV-4043).

v. Raftery, 271 F. Supp. 128, 148 (S.D.N.Y.), *aff'd,* 381 F.2d 446 (2d Cir. 1967).

In fact, the Title IV role and expertise of the Secretary of Labor have been overstated by petitioners, by the AFL-CIO, and, as might be expected, by the Secretary. In recognition of the administrative expertise of many regulatory agencies, the Congress often confers broad discretion to construe and apply various laws. In the case of the LMRDA, however, Congress assigned to the federal judiciary the responsibility for construing all titles of the LMRDA, and designing appropriate relief for violations of each of those titles. Although petitioners and their allies pay great homage to the Secretary's "expertise," as a practical matter the Secretary's role is limited to investigating election challenges and prosecuting Title IV cases. The Secretary has no power to determine whether an election is valid or invalid or whether it should be set aside. Rather, it is the very same district courts that resolve other LMRDA controversies, including those arising under Title I, that decide whether to void an election and order a new election. And, where new elections are ordered, whenever the union resists the terms proposed by the Secretary, it is the district court that must ultimately set the terms, supervise compliance, and declare the winners. The Secretary's primary role at this stage is to provide the manpower to supervise the new election pursuant to the court order. *See, e.g.,* James, *Union Democracy and the LMRDA: Autocracy and Insurgency in National Union Elections,* 13 Harv. C.R.-C.L. L. Rev. 247, 336-37 (1978).

Under these circumstances, it is improper to assume that the district courts are going to act in contravention of the limitations built into Title IV of the Act in cases before them under other titles which may have some impact upon members' electoral rights. Indeed, because elections are required to be held periodically, there will always be an

upcoming election which will be affected in some degree by almost every decision by a court under any of the LMRDA titles. The Secretary's "expertise" is not necessary to assist the courts and assure they do not go astray in every case which may have some impact upon a pending election.

In this case, the district court did not abuse its discretion by halting the ongoing election, requiring the union to place all eligible and properly nominated candidates on the ballot, and ordering the union to run a democratic and fair election. As this Court observed in *Sadlowski,* Title I rights are particularly critical, and deserve vigorous protection, in the context of election campaigns. If the district court had concluded that the commencement of mail balloting tied its hands, it would have sent a signal to those union officials who would violate the law to gain reelection that they need only promptly initiate a mail ballot election process, which may continue over several months, during which they may get away with their chicanery without judicial interference.[13]

Within a month after the court froze the election, the union actually offered to hold a new nomination meeting and election as part of a stipulation negotiated with the plaintiffs. Pet. App. 72. As the court of appeals noted:

> the district court constructed a preliminary injunction that effected as little change as possible from [the]

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[13] *See, e.g., Marshall v. Teamsters Local 468,* 643 F.2d 575 (9th Cir. 1980)(mail ballots sent immediately after nomination meeting, returnable in 30 days); Art. XII, sec. 5(a), Constitution of National Maritime Union, provides, *inter alia:* "Voting shall commence at 9 A.M. April 1st and continue through May 31st"; *Blanchard v. Johnson,* 388 F. Supp. 208, 216 (N.D.Oh. 1975), *aff'd. in relevant part,* 532 F.2d 1074 (6th Cir.), *cert. denied,* 429 U.S. 869 (1976) (Local 47, Longshoremen's Ass'n mail ballot ordered over polling period not less than 30 days; *Sheldon v. O'Callaghan,* 497 F.2d 1276, 1279 (2d Cir.), *cert. denied,* 419 U.S. 1090 (1974)(3 month polling period in Masters, Mates & Pilots). Significant Title I violations can take place during such lengthy polling periods.

> terms which defendants found acceptable... The best course in such a case is for the parties to agree on a preliminary order, and many of the provisions of the injunction were included at the request of or with the agreement of the [union], the objecting party here.
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> * * * *
>
> The district court sought admirably to construct an injunction with as few provisions as possible offensive to defendants.

Pet. App. 74-75. Thus, in a very real sense the court did not interfere with the union's autonomy since it was the union which ultimately decided to remedy its own misconduct and proposed the means adopted by the court for doing so. Given the broad discretion conferred upon district courts to remedy Title I violations, the overall objectives of the Congress when enacting the LMRDA, and the fact the union voluntarily agreed to the relief awarded below, we respectfully submit that the remedy contested in this proceeding was not improper, and that the court did not exceed its discretion or intrude impermissibly upon the Secretary's exclusive authority under Title VI.

This case illustrates the advantages of proceeding in a Title I action to promptly remedy violations of the Act rather than to await the conclusion of an election, and an uncertain remedy under Title IV.[14] Title I remedies are

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[14]The Secretary suggests, Br. pp. 38-41, that the relief awarded in this case caused a significant delay in the election. It is quite true that the election was delayed 10 months during which time the incumbent officers remained in office. However, the Secretary concedes that a failure to place a candidate on the ballot would be cause to set aside an election under Title IV. Br. p. 33. And what the Secretary does not tell the Court is that the average delay in reruning elections set aside under Title IV is two and one-half years. Note, *Union Elections and the LMRDA: Thirteen Years of Use and Abuse*, 81 Yale L. J. 407, 573 Appendix D (1972). The incumbent officers who are responsible for violating the Act as a means of "winning" election, remain in office during this period of delay. *See 29 U.S.C.* § 482(a)(2). In the case of local unions where elections must be held every third year, the Title IV remedy is hardly a remedy at all.

generally much less drastic and much more effective than the Title IV remedy in promoting the objectives of the LMRDA, while simultaneously accommodating the interests of unions. To the extent Title I remedies have the effect of correcting imbalances in the democratic equation, and assuring fair elections, they promote the overall objectives of the LMRDA. Indeed, Professor Clyde Summers observed that the pre-election remedies he believed to be available under the Act would have the following salutory effects:

> First, correction of invalidating defects saves the union not only the costs of a new election, but more importantly, the internal disruption caused by the lack of legitimatized leadership and the turmoil of another and more bitter campaign. * * * Second, correction of invalidating defects before the election simplifies the court's function and lightens its responsibilities.

Summers, *Judicial Regulation of Union Elections*, 70 Yale L. J. 1242, 1244-45 (1961).[15]

If union members are unable in Title I suits to remedy election violations until after elections have been completed, incumbent officials can generally nip democracy at the bud. In the event an election is set aside and rerun some years later, challengers often face great difficulty mounting a second serious electoral campaign. Vacations must be planned to permit campaigning, money must be raised, and a campaign organization assembled. Because incumbent officers remain in office until a new election is ordered and conducted, they can consolidate their power and, as their own employers who enjoy influential posi-

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[15] *See also* Note, *Pre-Election Remedies Under the LandrumGriffin Act: The "Twilight Zone" Between Election Rights Under Title IV And The Guarantees of Titles I and V*, 74 Colum. L. Rev. 1105, 1122 (1974); Note, *The Election Labyrinth: An Inquiry Into Title IV of the LMRDA*, 43 N.Y.U. L. Rev. 336, 351 (1968); Note, *Election Remedies Under the Labor-Management Reporting and Disclosure Act*, 78 Harv. L. Rev. 1617, 1623 (1965).

tions, they are able to mount a campaign with relative ease, compared to working members. As one court put it, "Once supressed, 'the democratic spirit' within a union 'may not soon be revived.' *Navarro v. Gannon, supra,* [385 F.2d 512, 520 (2d Cir. 1967), *cert. denied,* 390 U.S. 989 (1968)]." *Schonfeld v. Penza,* 477 F.2d 899, 903-04 (2d Cir. 1973). Similarly, as the court of appeals noted below, a Title I remedy "is more flexible and potentially less disruptive than a new election, the only remedy that is possible under Title IV. Preresult judicial relief possesses other advantages over Title IV, all of which minimize the harmful effect government intervention may have on union affairs." Pet. App. 66. Of course, this is not to say that Title IV violations can or should be remedied in Title I suits. It is to say, however, that whenever Title I violations can be remedied in a way which more promptly corrects electoral violations, the courts should not hesitate to do so and thereby to promote democracy in unions — the overriding objective of the LMRDA.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below, and clarify the interplay between Titles I and IV of the LMRDA by holding that Title I confers jurisdiction upon courts to fashion and award, at any time, appropriate relief (excluding the setting aside of elections "already conducted") for Title I violations.

Respectfully submitted,

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July 27, 1983

No. 82-432-CFX
Status: GRANTED

Docketed:
September 13, 1982

Title: Local No. 82, Furniture and Piano Moving, Furniture Store Drivers, Helpers, Warehousemen and Packers, et al., Petitioners
v.
Jerome Crowley, et al.

Court: United States Court of Appeals for the First Circuit

Counsel for petitioner: Witlen, Gary S.

Counsel for respondent: Solicitor General, Stern, Mark D.

Entry	Date	Note	Proceedings and Orders
1	Sep 13 1982	G	Petition for writ of certiorari filed.
2	Sep 13 1982		Appendix of petitioner Local No. 82., etc. filed.
4	Oct 7 1982		Order extending time to file response to petition until November 27, 1982.
5	Nov 8 1982		Brief of Federal Respondents in support of petitioners filed.
6	Dec 3 1982		Order further extending time to file response to petition until December 24, 1982.
7	Dec 27 1982		Brief of respondents Crowley, Jerome, et al. in opposition filed.
8	Jan 5 1983		DISTRIBUTED. January 21, 1983
9	Jan 24 1983		Petition GRANTED.
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11	Feb 25 1983		Order extending time to file response to petition until April 11, 1983.
12	Mar 7 1983	D	Motion of respondents to limit questions presented for review and/or to dismiss the writ as improvidently granted filed.
13	Mar 11 1983		DISTRIBUTED. March 18, 1983. (Above motion)
17	Mar 11 1983		Opposition of petitioners' to motion of respondents to limit questions presented for review and/or to dismiss
18	Mar 11 1983		the writ as improvidently granted.
19	Mar 21 1983		Motion of respondents to limit questions presented for review and/or to DENIED.
20	Apr 11 1983		Order further extending time to file response to petition until May 2, 1983.
21	May 2 1983		Joint appendix filed.
22	May 2 1983		Brief of petitioner filed.
23	May 2 1983		Brief of respondent United States filed.
24	May 2 1983		Brief amicus curiae of AFL-CIO filed.
25	May 2 1983		Lodging received.
26	May 4 1983		Record filed.
27	May 4 1983		Certified original record & C.A. proceedings received.
29	May 10 1983		Order extending time to file response to petition until July 27, 1983.
30	May 12 1983	G	Motion of the Solicitor General for divided argument filed.
31	May 25 1983		DISTRIBUTED. June 9, 1983
32	May 31 1983		Motion of the Solicitor General for divided argument GRANTED.

No. 82-432-CFX

Entry	Date	Note	Proceedings and Orders
33	Jul 27 1983	G	Motion of Association for Union Democracy for leave to file a brief as amicus curiae filed.
34	Jul 27 1983		Brief of respondents Crowley, Jerome, et al. filed.
35	Aug 16 1983		CIRCULATED.
36	Sep 8 1983		Motion of Association for Union Democracy for leave to file a brief as amicus curiae GRANTED.
37	Sep 30 1983	X	Reply brief of petitioners Local No. 82., etc., et al. filed.
38	Nov 23 1983		SET FOR ARGUMENT. Monday, January 9, 1984. (4th case)
40	Dec 29 1983	X	Reply brief of Federal Respondents in Support of Petitioner filed.
41	Jan 9 1984		ARGUED.